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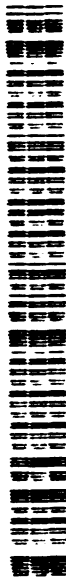
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A
SUMMARY
OF THE
ROMAN CIVIL LAW,
ILLUSTRATED BY
COMMENTARIES ON AND PARALLELS
FROM THE
Mosaic, Canon, Mohammedan, English, and Foreign Law.

WITH AN APPENDIX, MAP, AND GENERAL INDEX.

BY
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Χρόμιστα γὰρ πολιτεία οὐ ζηλοῦση τοὺς τῶν πίστεως νόμους, παράδειγμα δὲ αὐτοὶ μᾶλλον
ὄντες τισὶν, ἢ μιμούμενοι ἑτέρους. ΘΟΥΚ. ΞΥΓ. Β. κεφ. λζ'.

VOL. II.

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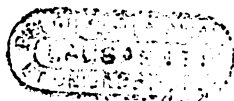
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LONDON:

V. AND R. STEVENS AND SONS,
(LATE STEVENS AND NORTON),
LAW BOOKSELLERS AND PUBLISHERS,
26, BELL YARD, LINCOLN'S INN.

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PREFACE TO SECOND VOLUME.

ALTHOUGH, in commencing this work, the Author was in a great degree prepared for many of the difficulties he has encountered; the progress of his undertaking has, nevertheless, developed others which he had not anticipated; and which must plead his excuse for the protracted appearance of this his first instalment of the Second Volume. The most formidable of these impediments have been the difficulties of arrangement, and *l'embarras des richesses* with regard to his authorities; and thus, in order to prevent his work from swelling to too great a bulk, he has often, though with great regret, cancelled much matter which he had originally intended to embody. The result has been that, in his desire to embrace that which more nearly concerned the Roman law, he has often been driven to strike out parallels and passages referring to the law of later ages, which could best be spared without interfering with the one great aim of his labors; namely, the illustration of the law of that empire, which formed a bond so perfect as to sustain that great body politic from a period 753 years before the Christian era to A.D. 1204, when the final blow was struck at the empire by the Latins, until which period, as an eminent modern writer on Byzantine history, George Finlay, truly observes, it had not forfeited its claim to identity with that founded by Romulus nearly two thousand years before, or had become a new, and, to speak correctly, a Greek kingdom. The victorious arms of senatorial Rome, the triumphs of the Cæsars, the intelligence and wealth of the Eastern Empire, failed to preserve its integrity from the repeated attacks of barbarous nations; but the security of property, guaranteed by a certain and known

law, was rendered, by the precedent of ages, too sacred to admit of serious change. At the same time, it is possible that the innovation of imperial ordinances may be considered as one of the elements of its decay, infringing as they did the principle on which the older Roman law was based; namely, the decisions of the courts founded on justice under the guardianship of an enlightened juridical logic.

In conclusion, the Author begs respectfully to express his grateful acknowledgment of the distinguished notice bestowed upon his labors by crowned heads of foreign states, and by the only surviving constitutional types of ancient Rome, whom he formerly had the honor to serve, whose senates contain so many men capable of appreciating the object he has in view. He has also to record his sense of the encouragement extended by the legal profession here and abroad to his undertaking, which he hopes to prosecute with less delay than circumstances rendered unavoidable in the earlier portions of his work.

TEMPLE, 13th April 1851.

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A SUMMARY

OF THE

ROMAN CIVIL LAW.

BOOK II.

TITLE VII.

The Rights of Things—*Res*—*Res Divini et Humani Juris*—*Res extra Patrimonium* and in *Patrimonio*—*Res Singulorum*—*Res extra Patrimonium*—*Res Communes*—*Publicæ*—*Universitatibus*—*Sacræ*—*Religiøsæ*—*Sanctæ*—*Res in Patrimonio*—*Res Corporales*—*Mobiles*—*Fungibiles*—*Mancipi*—*Nec Mancipi*—*Chattels*—*Res Immobiles*—*Res Incorporales*—*Servitutes*—*Maxims of Services*—*Servitutes Reales*—*Rusticæ*—*Urbanæ*—*Affirmativæ*—*Negativæ*—*Personales*—*Usufructus*—*Usus*—*Habitatio*—*Operæ Servorum*.

§ 921.

THE first book of Justinian's Institutes treats of Persons which have been disposed of here in the previous volume; the second commences by defining the nature of things which, in their most general sense, will form the subject of the present title. *Res*, in the Roman sense of the word, had three significations: in its first and most general sense, it is used in contradistinction to *persona* "*Rei appellatione*," says Ulpian,¹ "*et causæ et jura continentur*;"—in another and more restricted sense it signifies those objects of rights which are neither *personæ*, *actiones*, nor *facta*—*Non solum res in stipulatione deduci possunt sed etiam facta*:² here *res* and *facta* are placed in antithesis.

§ 922.

The classical Caius divides things into those *divini et humani juris*³—the former being such as, from the nature of their destination, are not available in general commerce, as the latter are; but there are also other things which, although not *divini juris*, can nevertheless not be the exclusive property of individuals, many persons having a joint right in their enjoyment to a greater or less extent: such are termed *res extra patrimonium*, as contradistinguished from *res in patrimonio*, which are capable of individual possession and enjoyment, and are otherwise designated as *res singulorum*.

First division of *Res*.

The term *Res* included whatever cannot be classed under *Persona*, *Actio*, or *Factum*.

Second division of *Res*, into *Res divini et humani juris*.

Res extra patrimonium are incapable of individual enjoyment, but *Res in patrimonio* are so otherwise termed—*Res singulorum*;

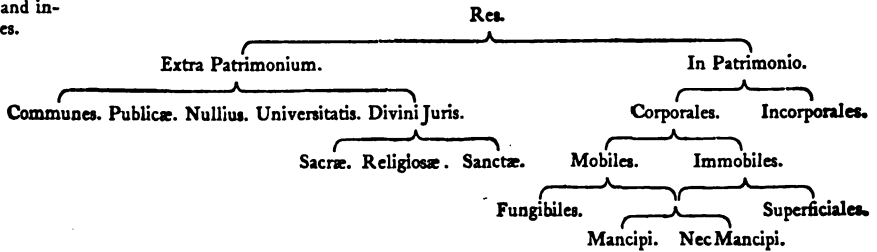
¹ P. 50, 16, 23.
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² P. l. c. § 7.

³ P. 1, 8, 1.
B

Res communes, publicæ, universitatibus, divini juris;
 Res sacræ, religiosæ, sanctæ;
 Res corporales, mobiles, immobiles, fungibiles, mancipi, nec mancipi, superficiales, and incorporeales.

Of the first description are *res communes*, *res publicæ*, *res universitatis*, *res nullius*, and *res divini juris*, in the most comprehensive meaning of the word, and consisting of *res sacræ*, *res religiosæ*, and *res sanctæ*. *Res in patrimonio* are divided into *res corporales*, or such as are capable of corporeal possession, which might be *mobiles*, or *immobiles*, or *incorporeales*, which were incapable of such corporeal enjoyment. The whole may be exhibited in the following tabular form :—



§ 923.

Res communes
 or Res nullius.

The air, running
 water, the sea
 and its coasts,
 and wild ani-
 mals.
 The air.
 The sea.

The exceptions
 to this.
 General rule by
 the law of
 nations.
 The mare clau-
 sum introduced
 by the law of
 nations.
 The Caspian,
 Euxine, and
 Marmora.

The interna-
 tional right to
 lakes.

Of things not in property the first are *res communes*, in a certain qualified sense termed *res nullius*, by which expression must be understood things the property of no one in particular, of which the Roman Law acknowledges four sorts,—the air, running water, the sea and its coasts, and wild animals as long as they are in a state of freedom. The air is necessary to human life, and every one may use so much of it as is requisite, nor is it capable of appropriation; and the same is the case with running water:¹ the sea is the highway of mankind, and no one can, without a violation of natural law, be prohibited from using it in the way of navigation or for other purposes.²

The modern exceptions from this rule, if such they can be called, introduced by the law of nations, arise in the case of the *mare clausum*, on which Selden has an admirable treatise; for it is held and admitted, that where the territory of a nation entirely surrounds a sea, as was formerly the case with the Caspian when in the middle of the Persian territory and the Black and White Seas (Euxine and Marmora) when both these, as the latter still is, were surrounded by the dominions of the Ottoman Padishah, that the latter had, in consequence, the right of closing the Straits of the Dardanelles and of the Bosphorus against all foreign vessels. These seas are then only to be considered as salt lakes, like the Dead Sea, it not being a matter of dispute that the right over lakes situated in the interior of a country appertains exclusively to its jurisdiction. Hence the Venetians never had any right but that of the strongest to the Adriatic, or the Danes

¹ By the law of England, ejectments will not lie for a piece of water, but must be

for so many acres of land covered with water. Black. Com. b. 2, ch. 2.

² Vid. Hug. Grotii *mare liberum*.

even formerly to the Baltic, nay, as little as the French have to call the Mediterranean a *lac Français*.

The claim of modern nations to seas not in this category is clearly against reason, and not founded on the law of nations but on the *droit du plus fort*, for no one can claim the exclusive enjoyment of anything, a right to enforce which there exists no natural means. Thus for Great Britain to claim an exclusive right to the navigation of the Irish Channel would be unreasonable, for it is no *mare clausum*; nor even is it competent to Great Britain and France to, claim a divided right in the St. George's Channel, although they may reasonably agree between themselves that the subjects of either party should confine their fishing within midchannel on either side, but this agreement ought not to prejudice the rights of third parties. Modern tacit consent has established the rule of jurisdiction seaward from the coasts of any country as far as cannon shot will reach, such rule being considered necessary for the due protection of territorial rights in cases of hostile aggression, and the rights of the coasting trade and revenue laws, and this rule is held to include bays; but it would be monstrous to assert this strict right in time of peace so far as the right of peaceable navigation is concerned, founded as it is on the principle of general utility introduced by the law of nations, and not on that of nature.

The Roman Law considered the coasts of the sea as common, to the extent of fishing, drying nets, and building the huts necessary thereto: *sed ejusdem juris est cujus et mare et quæ subjacet mari terra vel arena*.¹

The Irish and St. George's Channel cannot be construed into *maria clausa*.

The *litora maris* as *Res communes*.

§ 924.

Res publicæ were identical with *Res communes*, until Justinian² drew the distinction between them. These were—*flumina, ripæ fluminum, portus, viæ publicæ, fundi publici*.

With respect to the first, although water may freely be taken from rivers, yet the rights of piscery and navigation belong, according to the Roman Law, to the individuals of the nation through which the river flows, and the use of a high road is in like manner restricted to the nation through which it passes.

The banks of a river are in like manner public property, so far as the right of loading and the unloading of goods is concerned; but where private property is situate on the bank, those rights must be so exercised as to bring no damage to the proprietor.

Riparum quoque usus publicus est jure gentium, sicut ipsius fluminis. Itaque naves ad eas adpellere, funes arboribus ibi natis religare, onus aliquod in his reponere cuilibet liberum est, sicut per ipsum flumen navigare. Sed proprietates earum illorum est, quorum prædii hærent; quâ causâ arbores quoque in eisdem natæ eorundem sunt.³

Res publicæ are *flumina, ripæ fluminum, portus, viæ publicæ, fundi publici*. *Flumina*.

Ripæ fluminum.

¹ I. 2, 1, § 5.

² I. 2, 1, pr.; P. 1, 8, 2; Ger. Noodt. Probabil. I. 7, p. 10, et seq.

³ I. 2, 1, § 5.

Portus, viz publicæ, fundi publici.

The coast of the sea is free to all mankind, but, as in the case of rivers, the *imperium publicum*¹ over it and harbours belongs to the Roman people. In like manner, public roads, for the local system of quasi-public, or turnpike roads was unknown, all the arteries of the empire being sustained at the public expense. *Fundi publici* resembled the present Crown lands, and the revenues proceeding from them flowed into the *ærarium*.

§ 925.

The word *universitas* has a triple meaning: thus there may be a *universitas rerum*, *universitas juris*, or *universitas personarum*, the latter of which have already been explained.²

Res universitatis;

Res universitatis are either strictly *publicæ res* or *patrimonium populi*, and may be *res* or *patrimonium universitatis*, and the *res universitatis* are either properly *res universitatis* or *patrimonium universitatis*.

Distinguished by patrimonium and rent;

Public things are properly such as every one may use—such as rivers, their banks, harbours, and highways; but such things as belong to the whole nation, the *use* of which is, however, not common to every individual, belong in *patrimonio populi*, *scilicet*, *reipublicæ*, and perhaps the clearest distinction is between *use* and *usufruct*, for though *ager publicus* be not actually enjoyed by the nation at large, yet the rents of such, flowing into the public exchequer,³ become the common national property.

By use and usufruct.

Things, the *use* of which is free to all and every individual, are termed *res universitatis*, or things of the community at large, not the community in the sense of a private corporation,⁴ and Pomponius says *publica, quæ non in pecunia sed in publico usu habentur*.⁵ In the one case the *profits* are common to the whole nation, in the other the *thing* itself.

This *res universitatis* implies *use*; *patrimonium universitatis*, *usufruct*; and the distinction arises between the *jus ad rem ipsam* and the *jus ad usum rei*, and a *servus publicus*⁶ would be *patrimonium*, not *res*.

Res nullius in its strict signification are unappropriated things capable of individual possession.

Res nullius, in its second and more ordinary signification, implies those things which were by their nature indeed capable of individual possession, but which remained unappropriated. An *hæreditas*, apart the fiction⁷ which vested it in certain persons, is in this category.⁸

To which belong ieræ naturæ,

Wild animals termed *feræ naturæ*, wild birds and fishes not enclosed in private parks or waters, or, as it is expressed in the Institutes, *omnia animalia quæ cælo et terrâ nascuntur simulatque*

¹ I. 2, 1, § 1, et § 5; P. 1, 8, 2, § 1; P. 41, 1, 14; P. 43, 8, 3 & 4; Boehmer, l. c. cap. 2, § 6.

² § 880, h. op.

³ Vid. §§ 838, 865, h. op. for the distinction between the *Ærarium* and *Fiscus*.

⁴ Vid. § 880, h. op. Corporations.

⁵ P. 18, 1, 6, pr.

⁶ P. 18, 1, 6, § 1.

⁷ Vid. § 879, h. op.

⁸ P. 1, 8, 1.

ab aliquo capta fuerint, jure gentium statim illius esse incipiunt quod enim ante nullius est, id naturali ratione occupanti conceditur:¹ in like manner bees and gems, or other precious things found on the sea-shore, and *pari ratione* pearls in the sea, since oysters are fish and the sea is common property; but all these things become individual property, and cease to be *res nullius*, when slaughtered, tamed, or reclaimed, and some are even reckoned among *res mancipi* when so appropriated.

and things found in places extra patrimonium.

§ 926.

Lastly, *res divini juris* belong to the category of things *extra patrimonium*, and are such as are in some way connected with religious belief. Their division is triple,—those consecrated to divine worship are termed *sacræ*; spots where a dead body has been placed, *religiøsæ*; and things protected from violation by heavy penalties are distinguished as *sanctæ*.²

Res divini juris are *sacræ religiøsæ* or *sanctæ*.

Temples, chapels, and altars, consecrated to divine service are *res sacræ*, and moveables *donaria*, things belonging to sacrifices, the robes of priests, &c.³ the consecration whereof had been performed by the *pontifex maximus*, or by the emperors, who in later times combined this office with the imperial dignity. Some erroneously think that *res sacræ* are alone those dedicated to the *diis superis*,⁴ but we find temples and the like dedicated to the infernal and demi-gods, as Pluto, Proserpine, or Hercules, are also included.⁵ When things are consecrated to the use of the public deities, they are termed *publica*,⁶ but when to that of private or household gods, *privata*.⁷

Res sacræ are things consecrated to religious worship.

Inasmuch, then, as *res sacræ* belonged to the gods, they were *res nullius*, and were consequently incapable of valuation, hypothecation, or mortgage, usucapion or adaptation to any profane use.

Their exemptions and disabilities.

It now remains to be seen how objects were consecrated, and first it must be premised that those things said to be *sacro commendatæ*⁸ are not to be confounded with *res sacræ*, being things merely placed in the temples for security.⁹

Res commendatæ were not consecrated.

¹ I. 2, 1, § 12.

² Höpfner Ed. Weber, § 261, finds fault with this definition, for he asserts that *res sacræ* and *religiøsæ* were more recommended to the public protection than other things, and were therefore *sanctæ*; and that it is not true that all *res sanctæ* belonged to no one, and were utterly withdrawn from commerce, although Marcian, P. 1, I. 6, § 2, and Justinian, I. 1, 2, § 10, assert them to be so. That they were therefore not *divini juris*, but only such as were dedicated to certain protecting deities, *ex. gr.* to Mars, Neptune, and Minerva, which alone were *nullius in bonis*. Justinian, too, says, *res*

sanctæ veluti muri et portæ quodammodo divini juris usus sunt.

³ I. 1, 2, § 8.

⁴ Heinec. ad Alphen Diss. de Rei Consecratione. Ludg. Bal. 1791.

⁵ Heinec. El. Polyc. Leyser Diss. de Vet. Ictorum Divis. non jurid. p. 8.

⁶ Leyser Sp. 22, med. 1; Otto ad, § 8; I. 1, 2.

⁷ Savigny über die *sacra privata* der Römer Zeitsch. für geschichtl. Wissenschaft, 2 B. No. & V.

⁸ Cic. Leg. 2, 9, & 16; Herod. Hist. 1, 14.

⁹ The Moak of Soolemanyeh, in Constantinople, is full of valuable property, of all creeds and confessions, thus deposited.

Consecration was solemnly performed by public authority.

The inauguration of temples.

Distinction between *ædes sacræ* and *templa*.

The consecration of Christian churches contrasted from the Roman practice.

Lustratio *aræ* was performed with certain solemn ceremonies.

Laying the first stone a Roman ceremony.

The dedication performed by the pontifex and a superior magistrate.

The form in which dedication was performed.

It was indispensable that consecration should be performed by the pontifices under public authority,¹—an *auctoritas* of the senate a vote of the *populus*, or a decree of the sovereign,—and no private person could thus withdraw property from general commerce.²

Temples were consecrated by *inauguratione*, a term derived from the *augures* taking solemn possession of the space,³ after having consulted the auspices; and those buildings, in the consecration of which this formality was omitted, were termed *ædes sacræ*, but not *templa*.⁴

Christian churches are in like manner consecrated by bishops, a practice undoubtedly preserved from Pagan antiquity; nor is the distinction between *templa* and *ædes sacræ* entirely lost in England, the old parish churches having a claim to this higher title, whereas a chapel of ease or other consecrated building could scarcely be so designated if established on speculation, or otherwise by private trust deed, and not under any general or private Act of Parliament.

A place having been selected, it required to be purified; this was called *lustratio aræ*, and was performed by soldiers, whose families were of good omen, bearing branches of the *felix arbor*, followed by vestals, attended upon by boys and girls, both of whose parents were alive, and who purified the space, *lustrabant spatium*, with clear river or spring water.

The magistrate then approached, preceded by the *pontifex*, who performed the sacrifices called *suovetauralia*,⁵ pouring the blood and entrails upon the earth, with prayers to the gods that the edifice might rise under their divine assistance; the building was then begun by laying a large stone termed *lapis aspicularis*,⁶ as the commencement of the foundation.

Hence the ceremony of laying the foundation-stone of public buildings, which is usually done by some person of eminent, personal, or official rank, if not of royal dignity.

The *dedicatio*, or assignment to a particular deity, was next performed by a superior magistrate, preceded by the *pontifex* chanting a solemn hymn, with his hands upon the door posts;⁷ hence temples were termed *fana* a *fando*, *quia carmen*, or *solemnia verba fatur*,⁸ or, perhaps, from the Greek, *φωναί*, the words of dedication.⁹ Heineccius¹⁰ gives the form of words in which Romulus is said to have dedicated a temple to Jupiter Feretrius.

JUPITER
FERETRI HÆC TIBI VICTOR ROMULUS REX ARMA FERÒ TEM-
PLUMQUE IIS REGIONIBUS QUAS MODO ANIMO METATUS SUM
DEDICO. SEDEM OPTIMIS SPOLIIS QUÆ REGIBUS DUCIBUSQUE
HÒSTIUM CÆSIS ME AUCTOREM SEQUENTES POSTERI FERENT.

¹ Fest. v. Sacer.

² Guther de Jur. Pont. 3, 12.

³ Cic. pro Dom. 53; Tac. H. 4, 83.

⁴ Gell. 14.

⁵ Vid. the ceremony of planting a colony,
§ 854, h. op.

⁶ Tac. H. 4, 83; Grat. Inscr. p. 39, 5.

⁷ Liv. 2, 8; Cic. pro Domo. 47; Val.

Max. 5, 10; Brisson. de Form. 1, p. 124.

⁸ Fest. v. Fanum. Varro de LL. 5, 7,

p. 38. ⁹ Poplic. p. 104.

¹⁰ Ant. Rom. 2, 1, 2; Liv. 1. 20.

Lastly, certain statutes or *leges* were attached to the foundation¹ regulating its government.

All these formalities being duly observed, sanctity was supposed to inhabit the spot, and it was thenceforth taken out of the category of private property, and although the edifice should be destroyed or fall into ruin by the lapse of time, the place nevertheless remained hallowed.²

The *leges* conferred upon the foundation, after which the place was considered hallowed.

Res sacra might be desecrated by capture by the enemy; this, however, operated a mere suspension of their sacred nature, for on their afterwards being recovered, the law of *postliminium* acted upon them, and their former state revived.³

Suspension of consecration.

Exauguratio, however, operated an utter revocation of their hallowed character, and was performed by a ceremony termed *evocatio sacrorum*, described by Macrobius,⁴ and alluded to in the *Pandects*.⁵

Exauguration or revocation of consecration.

§ 927.

The Canon Law has retained the *res sacra*, being consecrated vessels, &c., for the immediate and actual use in the office of the church, and have added another species not consecrated, but immediately dedicated to the furtherance of holy purposes, under which may be placed property of the church, landed estates, capital, tithes and other dues for the payment of officers or the upholding the edifices of the church, and the discharge of other ecclesiastical obligations. These may be sold when the necessities of the church require such alienation, or when the discharge of debts incurred cannot be otherwise effected. Landed estate or other investment may also be changed when it pays a low rate of interest, and the investment can be advantageously improved. To effect this end, the bishop must institute an examination into the facts, and issue his decree of alienation thereupon.⁶

Consecration retained and extended by the Canon Law,

according to which consecrated things were not necessarily withdrawn from general commerce.

Acting upon this principle, the monks, to evade the statute of mortmain, were used to consecrate large tracts of country as churchyards, and thus, by attaching them to the church, withdraw them from public commerce.

§ 928.

Res religiosæ belonged, like *res sacra*, to the pontifical law,⁷ and were hence sometimes termed *sancta*, on account of the pontifical *sanctio*.⁸ A place became *religiosus* by the simple interment of the dead body, ashes, or bones of any human being.⁹ Constructive burial is asserted variously to have, and not to have conferred, this right,¹⁰ and the question consequently arises, whether the erec-

Res constituted *religiøsæ* by the interment of a dead body. Constructive burial or cenotaphs.

¹ Preserved in inscriptions on marble, and cited by Brimmonius, form. 1, p. 125.

² Plin. Ep. 10, 76; P. 1, 8, 6; P. 8, 38, 73.

³ P. 11, 7, 36.

⁴ Sat. 3, 8; I. Rævard Conject. 2, 17; Brim. form. 1, p. 54, 63, 64.

⁵ P. 1, 8.

⁶ Leyser Sp. 24, Med. 1.

⁷ Cic. op. Non. Marcell. 2, 805, p. 582.

⁸ Gell. 4, 9.

⁹ P. 1, 8, 6; P. 11, 7, 2.

¹⁰ Contra, P. 1, 8, 7; pro, P. 1, 8, 6, § ult.; Bynkerh Obs. 1, 5.

tion of a cenotaph; *κενотάφιον*,¹ would make a place *religiosus* or not.

The dedication of sepulchres to the manes.

All sepulchres were dedicated *diis manibus*, commonly represented by the two capitals DM., *diis manibus sacrum*, DMS., or *diis inferis manibus sacrum*,² DIMS.; but more lengthy inscriptions are to be found.³ *HÆC ÆDIFICIA PROPRIA COMPARATA FACTA DICATAQ. SUNT MONVENTI SIVE SEPULCHRUM EST ET OLLARUM QUÆ IN HIS ÆDIFICIIS INSUNT ET CONSECRATÆ SUNT RELIGIONISQ. EARUM CAUSA.* The spot on which the body itself was laid was not alone religious, but also a certain extent round it, which was often designated thus, IN. FR. PX. AGR. P. XX (in fronte pedes x in agrum pedes xx), or the sepulchres were even surrounded by walls.⁶

A bod could not be removed, or a sepulchre repaired, without the pontifical sanction.

The hallowedness which attached to the place after a dead body had been deposited there also prevented its removal, at least without permission of the *pontifices*, in whose jurisdiction graves were, and for this reason it was necessary to obtain the pontifical sanction, in order to repair a sepulchre.⁵

Restrictions as to burial.

It was not lawful to bury a body in a public place not appropriated to such purpose; for Cicero tells us, *locus publicus non potest privatâ religione obligari*.⁶ It was in like manner forbidden to lay a dead body in a *purus locus*⁷ belonging to another man, because it was equivalent to robbing him of his property, by withdrawing it from commerce; for every one might of his own authority constitute a place religious by the act of burial, but a *purus locus* held with another in common required the partner's consent to the act. In like manner, it was necessary for the proprietor even to obtain the usufructuary's concurrence.

The laws of all ancient nations forbade intramural sepulture,

A law of the Twelve Tables⁸ forbade intramural interment, or burning, *ne ultra urbem sepelietur ne uretur*, and this wise provision was confirmed by Hadrian,⁹ and again by Diocletian and Maximian.¹⁰ This practice, which is traceable to the highest antiquity among the Egyptians, Jews, and Greeks, was probably attributable, in the first instance, to the sanatory measures of the government, rendered the more necessary by the heat of the climate. The attaching the idea of sanctity to burial-places was probably merely a politic means of preventing the disinterment of bodies without due precaution. Of like origin was the duty imposed upon any one who casually met with an exhumed dead body to inter it. Thus the Egyptians had their catacombs set aside for

¹ These were erected in memory of a deceased person, whose body, from some accident, could not be found.

² I. Guther de Jur. Man. 3, 1.

³ Gruter Ins. p. 847, 5.

⁴ Hor. Serm. 1, 8, 12; Briss. A. R. 3, 15 & 16, p. 36, et seq.

⁵ P. 11, 7, 1 & 33; Plin. Ep. 10, 73; Grut. Ins. 628, UBI RELIQUÆ TRAJECTÆ

NON FERR. EX PERMISS. COLLEGII PONTIFICUM FIACULO FACTO. Grut. p. 68, 1.

⁶ De Leg. 2, 23.

⁷ I. 2, 1, § 9.

⁸ Cic. de Leg. 2, 23; D. Goth. Leg. XII Tab.

⁹ P. 47, 12, 3.

¹⁰ B. 3, 44, 12.

the purpose, the Jews their burial-places, where we find madmen took up their abode, and came out exceeding fierce, so that none might pass by that way.¹ The tombs of the Greek and Trojan heroes were all placed without the city or camp,² and the same is the case in all modern nations except England, where the public health is sacrificed to burial-fees.

and all modern nations except the English. The doctrine of the manes derived from Egypt.

The doctrine of the *Manes* was probably derived from Egypt, the nursery of pagan theology. The theories connected with the souls after death were intimately associated with that of its immortality; the soul of a deceased person was supposed, under the designation of *Manes*, occasionally to wander back to earth, and to haunt the neighbourhood where its mortal temple had been laid; in allusion to which we have, *id cinerem aut manes credis curare sepultos*.³ Hence, probably, the modern superstition that ghosts appear in churchyards where the bodies have been buried, or where the person has come to a violent or an unfair end.

The supposed apparition of ghosts is often resorted to by the Greek and Latin poets, and it does not appear to have been material whether the soul was in the Elysian fields, in the realms of Pluto, or in its intermediate state in Hades.

The apparition of manes, as used by the Greek poets.

It was considered imperative to obey the commands conveyed by the *manes* of the deceased; to this latter Ovid⁴ alludes in describing Achilles as appearing on his tomb near the Naustathmon of the Greeks before Troy, and demanding the sacrifice of Polyxena:—

It was imperative to obey the commands of the manes.

*Hic subito, quantus, cum viveret esse solebat,
Exit humo late rupta similisque minaci,
Temporis illius vultum referebat Achilles,
Quo ferus injusto petiit Agamemnona ferro:*

and afterwards,

Placet Achilleas mactata Polyxena manes.

Again, when Polyxena is to be sacrificed, Hecuba offers herself instead of her daughter, but Ulysses says,⁵—

*ὅν σ' ὦ γεραῖα καταθανεῖν Ἀχιλλέως
φάντασμι' Ἀχαιοῦς, ἀλλὰ τηνδ' ἡγήσατο.*

It was also usual to sacrifice and invoke the shades of heroes; thus, in Virgil,⁶—

It was customary to sacrifice to, and to invoke the manes of, heroes at their tomb.

*Solemnes tum forte dapēs et tristia dona,
Ante Urbem in luco falsi Simoëntis ad undam,
Libabat cineri Andromache manesque vocabat,
Hectoreum ad tumulum viridi cum cespite inanem,
Et geminas causam lacrymis sacraverat aras.*

¹ Matt. viii. 28; Mark v. 1; Luke viii. 26.

² Ulrick's Diss. on the Site of Troy. Posth. ed. Colquhoun. Transac. R. S. L. vol. ii. p. 136. 2nd Ser.

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³ Æn. 4, 34.

⁴ Met. xii. 441, 448.

⁵ Eurip. Hec. 389.

⁶ Æn. 3, 303.

In another place we have *anima* and *manes* in connection :—

Ninaque fundebat pateris animamque vocabat,
*Anchisæ magni manesque Acheronte remissos.*¹

The *manes* were occasionally invoked at a cenotaph :—

*Tunc egomet tumulum Rhætæo in littore inanem,
Constitui et magnâ manes ter voce vocavi.*

Hence, it would appear that it is erroneous to suppose there were no *manes* at a cenotaph, and if there were, it must have been a *locus religiosus*.

The *manes* usually appeared at night or in dreams. It was incumbent on every one to bury a dead body when he met with it.

These apparitions usually occurred at night or in a dream. *Nocturnosque ciet manes.*² Thus the witch of Endor invoked the ghost of Samuel at the request of Saul at night.³

It was incumbent on every pious person to bury a dead body when he came in its way, to give the *manes* rest, and enable them to pass the Styx. Polydorus⁴ appears to a female attendant of his mother Hecuba, and informs her of his treacherous death by Polymestor, who had murdered his ward to possess himself of his wealth, and had thrown the body into the sea, wherefore his *manes* could not rest, but followed the corpse swept to and fro by the waves. Antigone,⁵ of Sophocles, turns upon the prohibition to bury the dead body of Polynices, and mention of the same subject occurs in the Ajax.⁶ Λωβητὸν αὐτὸν ἐκβαλεῖν ταφῆς ἄτερ; in the latter book of the Iliad,⁷ we perceive the importance attached to the inhumation of a dead body.

The Pagans of antiquity believed in the immortality and divinity of the soul. The preservation of the body was not necessary to the preservation of the soul.

It is astonishing that, notwithstanding the many evidences to the contrary, the impression should still exist that the immortality and divine nature of the soul, demonstrated by the very expression *diis manibus*, was not believed by the nations of antiquity. With respect to Egypt, the preservation of the body has been erroneously connected with the preservation of the soul; such was not the case; it was merely thought to be gratifying to the soul that its earthly shell should be treated with befitting respect, and was considered, or the place in which it had been deposited, a point of attraction for the soul when it returned, as it was at liberty to do, to earth. For had the Egyptians even supposed that the soul was annihilated with the dispersion of the last particle of dust, how many souls of the poorer classes (for but few, comparatively, can have been embalmed) and of those killed in battle must have been lost? As, however, the body is never utterly destroyed, but merely converted into other substances, the soul, even if dependent upon the body, could never be utterly lost, for want of a representative or connecting particle; it is, therefore, exceedingly probable that belief

¹ Æn. 5, 99.

² Æn. 4, 490.

³ 1 Sam. xxviii. 7, et seq.

⁴ Eurip. Hec. 657.

⁵ Soph. Ant. 26; vide et Eurip. Phœnis

1630; Æsch. ἐπὶ ἐπὶ θηβ. 1020.

⁶ Soph. Ajax, 1388.

⁷ Il. 24.

in the immortality of the soul existed in the earliest ages, and has been merely adopted into the doctrines of more modern creeds.

To resume, a person may concede to another the right of laying a body in his own sepulchre, although the sepulchre itself formed no part of his property, or technically *non erat in bonis*, and was consequently not transferable as a part of his estate; if, however, a man alienated that part of his property in which his sepulchre lay, such burial-place passed to him who acquired the estate, as an appurtenance.¹

When the members from any cause had been scattered and buried in different places, the place where the head was laid was alone held *religiosus*.²

If a person laid a body in the land of another, he was compellable to care for its removal, or to pay the price of the place so rendered unsaleable, and the spot remained *religiosus*, until the removal of the body or ashes under pontifical sanction. The law of the Christian emperors, Valentinian, Theodosius, and Arcadius,³ —*nemo humanum* or *humatum, corpus ad alium locum sine Augusti affatibus transferat*,—is referable to the pagan superstition respecting the *manes*.

The right of burial in a private sepulchre may be granted, and when the land is alienated the sepulchre passes as an appurtenance.

The place where the head lay was alone religious.

The laying a body in another's land obliged to purchase or removal.

Pagan superstition connected with the *manes* preserved by the Christian emperors.

§ 929.

The third and last species of this *divini juris* are *Res sanctæ*, which Ulpian, in distinguishing from *sacra* and *profana*, tells us: *Sancta dicimus quæ neque sacra neque profana sunt, sed sanctione quâdam confirmata. Ut leges sanctæ, sanctione enim quâdam sunt subnixæ*.⁴

Again, since whatever *res* were inviolable were termed *sanctæ*, the word is otherwise derived by some from the ceremony by which they were rendered so, in which *sagmina*,⁵ or herbs, were used in the act of dedication to the *diis mediocrum*; but by far the more reasonable derivation is the preceding one of Ulpian, from the *sanctio*⁶ *pontificalis*.

The walls of a city, the passage outside them termed *pomoerium*, the pallisades of a camp, *vallum*, and the gates, *portæ*, were held to be *sanctæ*. With respect to the first, reference must be had to the mode in which the place was hallowed on its first selection,⁷ no one was permitted to dig a cellar into city walls, or rest beams in them, and the violation of the sanctity of the walls of Rome is historically alleged as the pretext for the death of Remus: the repair of the walls was not even permitted without the express permission of the emperor and provincial president, *muros municipales nec reficere licet sine principis aut præsidis auctoritate*,⁸ and this

Res sanctæ.

The walls of a city and the like were *res sanctæ*,

and could not be repaired without permission of the authorities.

¹ A. Mathæi, A. F. A. N. Com. ad l. 2, § 9, n. 71.

² Höpfner ed Weber, § 265.

³ C. 3, 44, 4.

⁴ P. 1, 8, 9, 3.

⁵ Fest. v. Sagmina, P. 43, 6, 2, & 3.

⁶ Fest. v. Sanctum.

⁷ § 926, h. op.

⁸ Ulpian, P. 1, 8, 9, § 4; C. 8, 12, 5.

notwithstanding that any one might undertake public works in general.

The statutes of the emperors, the *album magistratum*, and boundary stones. The right of sanctity was extended to certain persons, and the principle preserved by the Christian priesthood.

The statutes of the emperors, the *album* or proclamation tablets of the magistrates, boundary stones,¹ were *res sanctæ* in like manner.

This right of inviolability was also extended to certain persons, hence termed *personæ sanctæ*,—the emperor, the tribunes, ambassadors, and parents and patrons with reference to their children and clients.

As it was more advantageous to the priesthood, on the introduction of Christianity, not to abolish these superstitions, they were continued and increased in direct contravention of the new dispensation;² for while, on the one hand, the supposition upon which this sanctity was founded was repudiated—namely, the presence of *manes*—the number of *res sacræ religiosæ* and *sanctæ* was augmented by the substitution of saints for the former heathen deities, by the interposition of a species of trust by which much property was exempted from the general law of transfer; yet how often have the holy vessels of the church been sold to support bloody and unjust wars, and the tithes applied to the like purpose. Protestants have even preserved, with still less reason, these Pagan superstitions; and churchyards and churches are consecrated, although we are told that “God dwelleth not in temples made with hands.”

§ 930.

Res in patrimonio and *singulares*.

Res in patrimonio, otherwise called *singulares*, are things belonging to one or more persons; if to more than one, in partnership; nevertheless, not to so many as to form a people or a corporation duly constituted, for then they would be *res universitatis*.

Res singularis is a corporeal, and, at the same time, a definite thing, as a table, sheet of paper, or that which, though composed of many parts together, makes a connected whole,³ as a house, piece of machinery, &c.; it may also be an incorporeal thing, as a single right, or single genus.

Res universalis and *universitas rerum*.

Res universalis, or *universitas rerum* in its wider sense, consists of many different and separate things which together make one under a common name, *totum per adgregationem*: thus an inheritance may consist of moveables and immoveables, corporeal and incorporeal things mixed.

Universitas juris and *rerum*.

Universitates may be again, *stricto sensu*, divided into *universitates juris*, and *universitates hominis. s. rerum*: of *universitates juris*, there are but two, the *hæreditas* and the *peculium*; the rule in this case is *surrogatum sapit naturam ejus, in cujus locum surrogatum est* or *pretium succedit in locum rei et res in locum*

¹ Vid. commination against sinners, “Cursed is he that removeth his neighbour’s landmark.” Deut. xxvii. 17.

² Ex. gr., all houses or things, *quæ pie*

causæ inserviunt; hospitals, *xenodochia*; orphan asyls, *orphanotrophæa*; alms-houses, *ptochotrophæa*.

³ P. 41, 3, 30; P. 6, 1, 23, § 5.

pretii, which means that when a thing belonging to a *universitas juris* is sold, the price is to be looked upon as a part of such *universitas juris*, and if the possessor of such *universitas* appropriate part of the value in order to purchase something, such thing is to be looked upon as part of the *universitas*.

Universitates rerum convey the idea of corporeal things which, although distinct from each other, make together an entirety, as a library, a herd of cattle,¹ or the like.

§ 931.

The distinction between *res corporales* and *res incorporales* is, that the former can, the latter cannot, be touched—*res corporales sunt, quæ tangi possunt; res incorporales quæ tangi non possunt*: this definition has, however, in modern days been held defective, since magnetic fluid, for instance, cannot corporeally be touched; modern lawyers have therefore substituted the word *felt* or *perceived*. It will perhaps be interesting to the reader to refer to Heineccius's² masterly treatise on this point, in which he deduces this distinction from the principles of the Stoic philosophy.

Corporeal things are either moveables or immoveables. *Res mobiles* are of two kinds,—those capable of innate motion, *res sese moventes*, as animals or slaves; and those capable of being moved only, *res mobiles*, as books, furniture, and the like.

Res fungibiles were such things as wasted in the using, as provisions and the like, and were therefore not the objects of specific recovery.

Justinian³ is supposed to have abolished the distinction between *res Mancipi* and *nec Mancipi*; at all events there is no mention of them in his works: it is, however, important to examine what these were, as occasionally inferential allusion is made to them.⁴ The word itself is contracted from *Mancipii*, and compounded from *manus* and *capio*. *Res Mancipi* were transferable by formalities, which Roman citizens alone were capable of performing, the purchaser being denominated *Manceps*, and the vendor being under the obligation *evictionem præstare*: *res nec Mancipi*, were such as were not alienated by this solemn mode, and where the risk was at the charge of the purchaser.⁵

The incidents of *res Mancipi* were two,—first, the mode of transfer,⁶ which was *per æs et libram*,⁷ that is to say, by Quiritian transfer; nevertheless, it does not appear to have been indispensable that this mode of sale should be adopted, as *usus* or *usucapio*⁸ would suffice to pass *res Mancipi*.

Some sort of official sale was doubtless necessary to transfer *res*

¹ Vide Höpfner ed Weber Com. § 278.

² A. R. 2, 2, 1, usque ad fin.

³ C. 7, 31, 1.

⁴ P. 41, 3, 32; P. 47, 2, 86; Merill. Obs. 8, 38, p. 132.

⁵ Plaut. in Pers. 4, 3, 55, & 61.

⁶ Cic. Top. 10; Ulpian, 19, 3.

⁷ § 715, h. op.

⁸ Hor. Ep. 2, 2, 158.

Res corporales
and *incorporales*.

Res mobiles.

Res fungibiles.

Res Mancipi and
nec Mancipi.
Distinction
abolished by
Justinian.

Originally trans-
ferable *per æs*
et *libram*,

and implied a
warranty of sale.

mancipi so as to clothe them with all their incidents, and these will be found where the modes of acquiring are treated of.

The chief advantage of passing such things by this form was the security afforded by an official sale, which rendered a stipulation unnecessary, and bound the vendor by a *sponsio* to eviction, or double the value in case of refusal;¹ it was, in short, a warranty of title, *ni quid suum sit se evictionem præstiturum*. This operation was also termed *nexus*, because the vendor was bound to certain acts. *Res Mancipi* thus transferred were at once *in dominio*, and although *res nec Mancipi* could also be passed by the same formalities, yet they were nevertheless only *in bonis*;² hence we see that the form of transfer only had its full effect on certain objects, and we are still without full information as to all *res* which were in the category of *mancipi*: it is probable that they were not numerous, but consisted of such objects as in the primæval state of Rome were of the greatest practical value.

Res nec Mancipi were not peculiarly affected by the Quiritian mode of transfer.

Res Mancipi

were prædia in italic solo.

The jura attaching to such.

Slaves transferred by mancipation. Beasts of burden. Hæreditas. Filii familias.

Margaritæ.

Res Mancipi were enumerated in the schedule of property of a *civis Romanus*.

Secondly, as regarded the object itself, *res Mancipi*, as far as now can be ascertained, were—

1. *Prædia in italic solo*,³ landed property in Italy, and inferentially in any province on which the *jus italicum* had been conferred, nor did it matter whether these were *prædia rustica* or *urbana*,⁴ which might come into this category by accession.

2. The rights *jura* appertaining to *prædia rustica*, as *actus*, *viæ*, *aquæ ductus*, and all other servitudes attaching thereto by accession, but not those attaching to a *prædium urbanum*, because this was itself an accession, and there could be no accession on an accession.

3. Slaves transferred by the form of mancipation.

4. Quadrupeds used for burden or draught, as oxen, mules, asses, or horses.

5. An inheritance, *hæreditas sive familia*.⁵

6. A *filius familias*, for both these latter were capable of transfer by the Quiritian mode only, and were *in dominio*.

7. Pliny⁶ adds pearls, *margaritæ*.

And Ulpian⁷ says that all other things were *nec Mancipi*, even elephants and camels, which, although beasts of burden, were reckoned *bestiarum numero*, and this probably because they were originally unknown to the Romans.

Cicero⁸ tells us that *res Mancipi* were enumerated in detail in the schedule or protocoll of the property of a Roman citizen, but that the rest was set down in a lump sum.

Moveables in the English law are designated under the generate term of chattels, a word derived from the barbarous Norman Latin

¹ Paul. R. S. 2, 17, 2, et seq.; Cic. ad Fam. 7, 30; Varro de LL. 6, 5, p. 58.

² Ulp. 1, 16.

³ Ulp. 19, 1.
⁴ Cic. de Orat. 1, 178; sq. et de Offic. 3, 67; pro Flacc. 32.

⁵ Gell. 15; I. 2, 26, § 1.

⁶ H. N. 9, 35.

⁷ 19, 1.

⁸ Pro Flacco, 32.

word *catalla*, cattle, and everything was included under this term which was not a feod, but, strictly speaking, it was applied to beasts of husbandry.

Moveables by the English law and chattels.

The origin of the term may be traced to that period when the most valuable part of a man's moveable property consisted in flocks and herds: hence the Latin word *pecunia* used to designate money, from *pecus*; and as in the Roman state, land from the habits of the people was comparatively of little value, *pecunia* was used to convey the idea of a man's property generally;¹ thus we find, in the laws of the Twelve Tables, *uti paterfamilias legasset super pecunia sua ita jus esto*. The nobles in the principalities of Wallachia and Moldavia, the ancient Dæcia, where the foundation of the language is purely Latin, are termed Boyards, from *boves*, riches, having been formerly estimated by the number of a man's cattle, as it was among the patriarchal Jews.

Origin of the term Chattel.

The distinction between personal and real property was introduced with the feudal system, and was unknown to the Romans. In England the principle is diametrically opposite to that of ancient Rome, for while moveable property was there of the greatest value, land was of paramount importance here. This increased under the Norman rule, nor was it uncommon to amerce a man in half or the whole of his chattels; nor was this, which would now be a ruinous fine, at that time a measure of the extremest rigor.

Things personal consist of goods, money, and all other moveables, and of such rights and profits as appertain thereto, which latter, however, come under the head of incorporeal things. Things personal or chattels are said to be in possession, but things real in seisin.

§ 932.

Res immobiles things, are such as land, meadows, gardens, and the like—also a house, because not removeable without damage; nevertheless, there are things *immobiles vel naturâ vel juris intellectu*—immoveable by nature or in the eye of the law: thus the law considers trees *fructus pendentes* as immoveable, because so strongly fixed to the immoveable that a severance from it would cause damage to their nature, or because they are fixed and necessary to the enjoyment of the reality, as the doors, windows, tiles, roof, &c. of a house. The English law has invented another term for many of these, that of fixtures.

Res immobiles.

The distinction between moveables and immoveables is very important, as will hereafter appear, inasmuch as limitations affect the former after three years, the latter after ten or twenty; again, the husband is sole master of moveables, but not always of immoveables; and lastly, immoveables are capable of rights, which moveables are not.

¹ P. 50, 16, 222.

Incorporeal things were neither moveable nor immoveable. Immoveables by the English law.

The division into moveable and immoveable attaches only to corporeal things, incorporeal objects being, strictly speaking, neither one nor the other.

Things real in England consist of lands, tenements, and hereditaments, which last, however, include everything capable of inheritance, and consequently comprises chattels and incorporeal things.

Tenement is everything subject to tenure, but land includes everything on the surface of the earth, above and below it; consequently mines pass with a grant of land, to which the word seisin is applied, and not possession.

§ 933.

Res incorporales are such as cannot be touched.

Res incorporales are in other words *jura* or rights, and inasmuch as corporeal things are those *qui tangi possunt*,¹ so are incorporeal things those *qui tangi non possunt*; consequently, as the first are capable of actual possession, so the latter are only capable of improper or *quasi* possession, and are said to be in *bonis*, not in *mancipio*, for no corporeal seisin can be had of them, being merely rights, of which exercise is the proof.

Definition of *servitus*.

A servitude or service is a real right attaching to the property of another, whereby the owner must suffer something in respect of this property which he otherwise, in right of his ownership therein, would not have been obliged to suffer, or forbear some act which he otherwise would have had the right to have performed in virtue of his character of owner for the benefit of some other person or thing. This is more explicatory than, though not so concise as, the definition of the Pandects,—*servitus est jus quo res alterius rei vel personæ servit*.²

§ 934.

Nature of service. Service is a real right

Servitus is a real right, for when there only exists a *jus ad rem*, as against another, whereby that person must suffer something to be done to his property, or omit to do something, it is no good service: for instance, the lessor must allow the lessee to occupy the premises leased; here no service accrues to the lessee, because no real but a mere personal right to the house subsists as against the lessor.

attaching to the property of another,

Secondly, a servitude is a right attaching on the property of another; as, for example, to pass through another court-yard, or feed beasts on another's pasture; and here the condition of a slave is not included, for, although a slave is a thing, yet he is the personal property of his master.

whereby something must be suffered or foreborn

Thirdly, it is a right in virtue whereof a person must suffer something to be done to his property by another, or forbear to do some act, to suffer or forbear to do which he could not be compelled, compatibly with his natural freedom, were it not for

¹ I. 2, 2.

² D. 8, 1, 1.

the servitude. One man may allow another to draw water at his well, or promise not to build his house so high as to obscure his windows, in both of which cases a service is created.

Fourthly, this act or forbearance is for the benefit of another; and this is requisite, since a real service cannot be originated for the mere amusement of another.

for the benefit of another.

Fifthly, the right to a service attaches either to a thing as an incident thereto,¹ or to a person as such; hence *servitutes* are of two kinds, *reales sive prædiales et personales*, for if every possessor of the object have a right to the service, the service is clearly real, but if it be granted to an individual for the term of his natural life, it is clearly personal: thus, if Sempronius grant Titius his neighbour the right to draw water from his well, Titius can exercise this right, but not a subsequent owner of Titius's house or his heir, but if the right be granted to Titius's house, then the subsequent owner thereof can exercise the right, which is a real servitude or service.

Attaches either to a thing or a person.

Wherefore termed real or personal.

Such rights as these are for the mutual accommodation of neighbours, and are consequently matters of a private nature, but contracts between private persons will not be valid when they perniciously affect the public good,² and here the principle of *ita utere tuo ut alterum non lædas* is applicable.

§ 935.

There are certain general maxims applicable to services which serve as useful guides in this matter; and, firstly, *res propria nemini servit*, a service must always attach on the property of another, for the owner has the service not *jure servitutis*, but *jure dominii*.

General maxims applicable to services.

A service must apply to the property of another.

Consists in sufferance or forbearance. Not in faciendo.

Secondly, *servitutum non eâ naturâ est ut aliquid faciat quis, sed ut aliquid patiatut aut non faciat*,³ a good service consists in suffering and forbearing, not in doing, and is of a purely passive nature; consequently, a promise to *do* a certain thing, such as keeping another's land cultivated, would create no service, but merely a *jus ad rem*, binding the promissor and his heirs. But if a man promise that all future owners of his estate, not being his heirs, *successores singulares*, shall plough another's land, neither is a service nor even a *jus ad rem* created, for *servitutum res debet non persona, res autem facere non potest*; and Labeo⁴ says, "*Servitutum non hominem debere sed rem*." This rule was probably established with a view to the remedy.

Thirdly, *servitutes* are indivisible because incorporeal. The consequences of this are manifold; firstly, all the heirs of one who promises a service can be sued for its fulfilment, *hæredes servitutum promittentis tenentur in solidum*, and, vice versa, *singuli hæredes stipulatoris solidum petunt*,⁵ each heir can sue for the fulfilment of the entire service; secondly, the whole estate is subject to the service less a special restriction to one part of it,

Services are indivisible;

¹ P. 50, 16, 86.

² P. 2, 14, 38.

⁴ P. 8, 5, 6, § 2.

³ P. 8, 1, 15, § 1; Pomponius.

⁵ P. 8, 1, 5.

partem divisam, and though a part of the land be washed away, yet the rest is liable for the service; thirdly, if the estate claiming the service be afterwards divided among many, each may claim the service; lastly, the right to a service is not affected by a mere partial exercise.

may be limited
as to time;

Fourthly, a *servitus* may be *temporalis in diem* until, or *ex die* from, a certain period; and if this condition be infringed, the prætor grants *exceptio doli* or *pacti*.

must have a
causam per-
petuam.

Fifthly, a *servitus* must have a *causam perpetuam*, that is to say, must in its nature be such as to be always available without active interference; thus, the right to take water from a spring would be a good, and from a cistern a bad service. Nevertheless, the prætor will bring equity to the relief of one in possession of such faulty service.¹

In Germany and England services may consist in *facienda*, a practice which sprung out of the feudal law.

§ 936.

Servitudes are
real, personal,
rustic, urban,
affirmative, or
negative.
Rustic services.

Servitudes are either *reales*, otherwise *prædiales*, or *personales*. *Servitudes reales* are either *rusticæ* or *urbanæ*, which latter may be *affirmativæ* or *negativæ*.

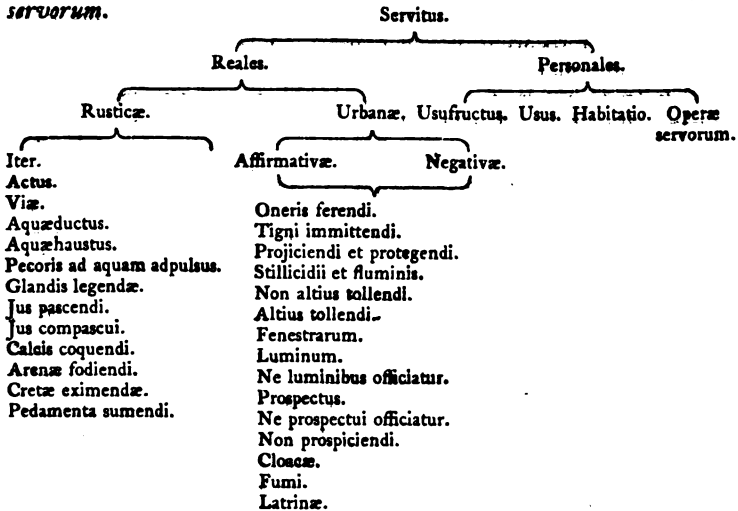
Servitudes rusticæ are,²—*iter, actus, via, aquæductus, aquæhans-tus, pecoris ad aquam adpulsus, glandis legendæ, jus pascendi, compascui, calcis coquendi, arenæ fodiendi, cretæ eximendæ, pedamenta sumendi*.

Urban services.

Servitudes urbanæ are principally as follow:—*oneris ferendi, tigni immittendi, projiciendi et protegendi, stillicidii et fluminis, non altius tollendi, altius tollendi, fenestrarum, luminum, ne luminibus officiatur, prospectus, ne prospectui officiatur, non prospiciendi, cloacæ, fumi, latrinæ*.

Personal ser-
vices.

Servitudes personales are:—*usufructus, usus, habitatio, operæ servorum*.



¹ P. 8, 3, 9; P. 8, 4, 2.

² I. 2, 3, pr. 1.

³ Ibid. § 2.

§ 937.

Real services attach to landed estates, *prædia*. The estate enjoying the service is termed *prædium dominans*, and that suffering it *prædium serviens*.

Prædium dominans and *serviens*.

Prædia rustica are distinguished from *prædia urbana*, not by situation, but by the use which they serve; thus a *prædium urbanum* may be in the country, and is such as is used for the habitation of man, and not connected with agricultural pursuits; the mansion being sometimes termed *prætorium*,¹ but under *prædia rustica* are included all such buildings as serve for agricultural purposes, for the habitation of the bailif, villicus, and his family, sheds and stabling for beasts and horses, and those termed *ædificia fructuaria*, consisting of barns, granaries, cellars, and all buildings in which produce is stored.²

Prædia rustica differ from *prædia urbana* in respect of their use.

Prædia urbana are mansions. *Prædia rustica*, agricultural buildings.

Services in the English law are incorporeal hereditaments, and, as Blackstone informs us, have never been reduced to any regular system of division, and that no complete enumeration of them is to be found in our books. They consist, as we have seen, in the Roman law, in rights in *alieno solo*, and may be classed under *profits*, such as the right of fishing and agisting cattle; and *easements*, which are rather a matter of convenience than profit, such as the right of way, &c. Since Blackstone wrote, Mr. Gale has treated, with great success, on the latter, and is worthy to be consulted on this branch of law, where the analogy with the Roman system will be found so striking as to lead to a conviction that it was derived from that classical source.

Services in the English law are incorporeal hereditaments;

in *alieno solo*; and are appurtenant or in gross.

§ 938.

Servitus itineris, from *eo*,³ is the right of a footpath, on which however, a horse may even be ridden if the place allows of it;⁴ its width has not been ascertained,⁵ and appears to have varied.

Servitus itineris.

Servitus actus is the right of driving cattle, a beast of burden, or a chariot, but not a cart, which first must, however, not be laden;⁶ in which case it was said to be an *actus plenus*. Its width was four feet over all;⁷ being, moreover, in a measure regulated by the locality, in the absence of a defined agreement.⁸

Servitus actus.

Servitus viæ is the right to drive a loaded cart or waggon through another's ground, including the haulage of timber and stone;⁹ its width was four feet over all.¹⁰

Servitus viæ.

And here it is to be remarked that the *actus* comprehends the *itineris*, and the *viæ* both.¹¹

In a *viæ* sixteen feet at the turnings, otherwise where straight

¹ Suet. Calig. 37; P. 50, 16, 198.

² Columella de re Rust. 1, 6.

³ Varro de LL. 4, 4, p. 7.

⁴ P. 8, 3, 1, & 12; 8, 1, 13.

⁵ P. 8, 3, 23.

⁶ P. 8, 3, 1, pt. 7 & 11.

⁷ Varro de LL. 4, 4, p. 6; Festus v. Actus.

⁸ P. 8, 3, 13, § 2 & 23, pr.

⁹ P. 46, 4, 1, pr. 7 & 13; Thib. l. c.

¹⁰ § 754.

¹¹ P. 8, 3, 7, pr.

¹² P. 46, 4, 13, § 1; Hein. A. R. 2, 3, 5.

eight was understood,¹ and to have been so fixed by the Twelve Tables, VIA IN PRORECTO VIII. P. IN AMFRAC TO XVI PLATA ESTO.²

Servitus aquæductus.

Servitus aquæductus was the right to convey water by canals, bricked trenches, or pipes, through another's land.³ Some aqueducts were public, but others for the use of private farms, to which this service particularly applies.

Servitus pecoris adhaustum adpulsus.

Servitus pecoris adhaustum adpulsus is the right of driving cattle to water at another's spring, pond, or brook.

Servitus glandis legendæ.

Servitus glandis legendæ was the right of gathering acorns.⁴

Servitus pas-cendi
Servitus aquæ-haustus.

*Servitus pas-cendi*⁵ is the right of grazing cattle, in English law termed agistment, on another's pasture.

Servitus aquæhaustus, or *hauriendæ*, is the right of taking water from the spring, fountain, or pond of another.⁶

Right of way in English law.

A right of way in England may be either attached to a particular house or land, where it is said to be *appurtenant*, or in Roman law a *real* service; or annexed to the person of the grantee, where it is said to be in *gross*, or in Roman law a *personal* service. And as the law will presume that he who alienates a piece of ground to another intends to give him the power of enjoying it, a right of way will accrue to it as of course, and in like manner a lessee has free entry to carry away emblements after the termination of his tenancy. The Twelve Tables justified a man, who had a right of way over another's land, in passing over any part of such property when the ordinary road was out of repair, which corresponds in general with the law of England.

Water-courses.

Of like nature is the right of water-courses, which may generally be defined to be the right a man has to the benefit of the flow of a river or stream; but this right is confined to pastures and lands from which the fruits have been harvested.⁷

Restriction.

If the number of the cattle has been fixed, the lambs dropped subsequently on the land will not be included.⁸ Cattle infected with a contagious disease clearly cannot be so agisted.⁹ But if the number be left uncertain, it must be determined by the necessity of the dominant estate.¹⁰

Jus compascendi.
Mithut in Germany.

Jus compascendi, the right of joint agistment, is termed in Germany *Mithut*. In the above case, the owner of the *prædium serviens* was excluded only where the *prædium dominans* could lay claim to something certain.¹¹

Servitus compascui.

Servitus compascui consisted in the right of many proprietors reciprocally to agist their cattle on each other's land,¹² or where

¹ P. 8, 3, 8; Varro de LL. 6, 2, p. 48.

² Goth. ad XII Tab. 8.

³ Vitruv. Architect. 8, 7; Palladius, 9, 11; Heinec. A. R. 2, 3, 12.

⁴ Thib. l. c. § 754.

⁵ Thib. l. c. § 754, and authorities there cited; P. 8, 3, 4.

⁶ Walch de Aq. Haur. Serv. Jan. 1754.

⁷ Wellfeld Jur. For. § 679.

⁸ I. F. Runde Beitr. zur rechtl. Gegenst. I b., n. 10.

⁹ Carpzov, P. 1, C. 41, Def. 8, Kind. Quest. For. T. 4, c. 57.

¹⁰ Kind. l. c. T. 2, c. 59; T. 4, c. 65.

¹¹ Thib. l. c. § 754, and authorities there cited.

¹² A Tretsch. de Compas. (Jan. 1670).

many jointly exercise the *servitus pascendi* in common on the land of another. This, in Germany, is termed *Koppelhut* and *Koppelweide*.¹ This right may be granted between two proprietors by request, merely in the form of a personal service, *jure familiaritatis*.² Thibaut³ thinks that implication will not interfere in the latter case, if the possession be clearly made out.

Koppelhut and Koppelweide.

Servitus calcis coquendi is the right of burning lime on another's estate.

Servitus calcis coquendi.

Servitus arenæ fodiendi is the right to dig sand on another's land.

Servitus arenæ fodiendi.

Servitus cretæ eximendæ is the right of taking a white earth resembling pipe-clay from another's estate; it is earth which was used for dyeing and coloring their white garments.

Servitus cretæ eximendæ.

Servitus pedamenta sumendi was the right of cutting props and poles in another's copse.

Servitus pedamenta sumendi.

§ 939.

Under *res superficiales* were included in the Roman law all such rights as one party may possess in the property of another. The *jus superficium* does not supersede, but only restricts, the right of the *dominus directus*, or owner of the fee; and hence *superficies* may be placed under the head of services:⁴ the possessor of such right is termed a *dominus utilis*, yet his rights are to be distinguished from those of the emphyteutical proprietor, whereof hereafter.

Res superficialis is a dominium utile.

When the *dominus directus* of an immoveable grants to another a *superficies* or *superficiarium*, be it a building or aught else⁵ thereupon so closely attached, or therewith so intimately connected,⁶ that, according to the maxims of Accession, it must pass to the owner of the soil or remain thereupon.⁷ In such case the owner of the soil has a property in the *superficies*,⁸ and can vindicate it as his property.⁹ On the other hand, the Superficiary possesses many rights which, for the period of his occupation, cause the *jus superficiarium* closely to resemble that of the actual proprietor, the lord himself.

The owner of the soil can vindicate a *superficiarium*.

§ 940.

Servitutes reales, or real services, properly so called, are annexed to the farms from which they are due. We have already seen of what nature rustic services are; and, bearing in mind what constitutes *urbani* services, we will pass to them, premising a few words on the law of buildings in Rome. According to the laws of the Twelve Tables, every house was obliged to have around it a certain space, so that each habitation was isolated: this space

Houses isolated by law of Twelve Tables.

¹ Münter von der Koppelweide (Hagemanns und Günthers Arch. 4, Th.)

² Stryk de Jur. Famil. Cocceii denies this, L. 8, T. 3, qu. 2.

³ l. c. § 754.

⁴ P. 30, 1, 86, § 4.

⁵ P. 8, 3, 13, pr.

⁶ P. 43, 17, 3, § 7.

⁷ Herliff. de Superf. Giess. 1682 (op. V. I. T. 3); Thib. Syst. des P. R. § 772, n. x.

⁸ P. 43, 18, 2; P. 39, 2, 49; P. 50, 16, 49.

⁹ P. 43, 18, 1, § 4.

Many urban services could not exist.

Houses built in stacks having an ambitus.

Constantinopolitan building law.

was termed *ambitus*,¹ and extended two feet and a half round the house, for the purposes of repair and safety in case of fire; and so long as this system of isolation existed, many of the urban services which hereafter accrued could not have had an existence, more especially the *servitus oneris ferendi*; but when the number of citizens increased in Rome as well as in other populous cities, it was found practically difficult to uphold the strictness of the old rule, and one *insula* or stack of buildings came to contain two or more dwellings, subdivided, perhaps, or constructed anew in this form, to save the two and a half feet *ambitus*, to which must be attributed the origin of services. Under Nero the old building law was re-introduced;² and later, Antoninus and Verus Augusti issued rescripts to the effect that, *in arch, quæ nulli servitutem debet, posse dominum vel alium ejus voluntate ædificare intermisso legitimo spacio à vicinâ insulâ*.³ From this period houses began to be connected and surrounded by a common wall, and this continued notwithstanding some laws of Constantine the Great and succeeding emperors, who ordained, by particular constitutions, how far distant a private house should be from a granary or a public place.⁴ Lastly, the famous constitution or Building Act of Zeno regulated the matter quoad Constantinople, and it will be well to refer to this law, and Dirksen's admirable commentary thereon.

§ 941.

Servitus oneris ferendi. Services on private buildings;

It sometimes occurs that a neighbouring house is charged with the service *oneris ferendi*—that is, of supporting on its wall, vault,⁵ or its pillars, some portion of the neighbouring house; but it was not a part of the service that the *columnæ serviens* should be repaired by its owner upon the principle *paries oneri ferendo, uti nunc est, ita sit*:⁶ this was, then, a matter of special stipulation, *ut reficeret, lapide quadrato vel lapide structili*, or by any other work. Gallus Aquilius asserts this compact to be contrary to the nature of services;⁷ and it is true it consists in *faciendo*, but it is overruled by that of Servius, who admits the validity of like conditions in such services:⁸ during the repairs the proprietor of the *prædium serviens* is, however, not obliged *onus ferre*.⁹ It has already been seen that the end of a beam cannot be placed in the wall of a town on account of its public character,¹⁰ and that consequently such are not liable to services.

public not liable thereto.

§ 942.

Servitus tigni immittendi.

Servitus tigni immittendi was the liability to suffer that a tile, beam, stone, or piece of iron—for under *tignum* all these, and

¹ Varro de LL. 4, 4, p. 6, Festus v. Ambitus.

² Tac. A. 15, 42. ³ P. 8, 2, 14.

⁴ C. Th. 8, 12, 4, & 46; C. 8, 10, 9, & 11; Bris. A. R. S. J. 2, 4; Cuj. Obs. 1, 4, 3.

⁵ Strake Rechtl. Bed. 4, B. 158, Bed.

⁶ P. 8, 2, 33.

⁷ P. 8, 1, 15, § 1.

⁸ P. 8, 5, 6, § 2 & 5.

⁹ P. 8, 2, 33; P. 8, 5, 6, § 2; Thib. l. c. § 753.

¹⁰ § 229, h. op.

indeed all building materials, were included—should be placed in the wall for the benefit of the neighbour. A question now arises as to whether, if when the beam so placed in a neighbour's wall by right of this service rot, it may be replaced by a new one. A text of Pomponius,¹ termed by commentators *textum mirabilem*, because it does not appear consonant with common reason, prohibits it. *Si cum meus proprius esset paries, passus sim te immittere tigna, quæ antea habueris, si nova velis immittere, prohiberi a me potes; immo etiam agere tecum potero, ut ea quæ nova immiseris tollas.* Now, by law, any one in whose wall a *tignum* be placed without the existence of a service, is at liberty to remove it of his own authority; but here an action is spoken of: this must then be understood of the case where a service of a specific *tignum* or *tigna* exists, and the possessor of the *prædium dominans* puts in *nova* such as had not been there before, and were beyond the stipulations of the service.

§ 943.

Servitus projiciendi et protegendi. The first is the right of building anything which overhangs a neighbour's ground without touching it, whereby the air, &c. is obstructed.² The second is the right of building a *protectum* or roof against the weather, which overhangs another's property, which cannot be done without a service, as the air and sun belong, *pro tanto*, to the possessor of the ground so shaded.

Servitus projiciendi et protegendi.

Servitus stillicidii vel fluminis recipiendi vel avertendi consisted in the right of conducting the rain water from the roof of one's house into a neighbour's garden or area, or of receiving such water from his roof. In the case of eavesdrop the lord of the dominant estate must not make it lower, although he may make it higher:³ the lord of the servient estate, on the other hand, is permitted to erect works under the eavesdrop only where such constructions do not impede the drop of the water.⁴ The Roman houses were built in the form of court-yards: round these squares the apartments were ranged and covered by an *impluvium* or slanting roof, converging towards a cistern in the middle of the court, which contained the rain water; consequently, in the dry climate of Italy, it was more often an advantage than the reverse to be able to obtain as large a supply as possible of rain water: in many cases the roof was flat; and in such case it was necessary to place gutter tiles, *imbrices*, to convey the water to its reservoir. The stipulation for a service therefore ran, *flumina stillicidia ut nunc sunt ita sint.* Varro⁵ thus distinguishes between *flumen* and *stillicidium*,—*Fluvius, quod fluit, item flumen; à quo lege prædiorum urbanorum scribitur: stillicidia fluminaque ut ita fluant cadantque.*

Servitus stillicidii et fluminis.

¹ P. 8, 5, 8, § 2 & 14.

² P. 8, 3, 2; P. 50, 16, 242, § 2.

³ P. 8, 2, 20, § 5; Thib. l. c. § 753, n. g.

⁴ P. 8, 2, 20, § 3, compare with § 6; Thomasius de Serv. Stillicidii, § 62, et seq.

⁵ De LL. 4, 5, 8.

Inter hæc hoc interest, quod stillicidium ; eo quod stillatim cadat ; flumen quod fluat continue, drippings and drainings.

§ 944.

*Servitus non
altius tollendi.*

*History of this
service :*

*under the Re-
public ;*

Augustus ;

Nero ;

Trajan ;

*Severus and An-
toninus.*

Servitus non altius tollendi was in restriction of that natural law which allows a man to raise upon his own ground a building to an infinite height :¹ the maxim of English law is, *cujus est solum ejus est usque ad cælum*, restrained by another maxim, *ita utere tuo ut alterum non lædas*. For the raising a house to an indefinite height not only affected the prospect and light of another, but also intercepted the free circulation of air ; hence the practice of stipulating *ne altius tolleret*, and the origin of the *servitus non altius tollendi*. Many reasons contributed at a later period to cause this point to be regulated by law. We are led to believe that this question was under consideration even during the Republic,² though it is more than probable that no law was made upon the subject, from a disinclination to interfere with public and vested rights. Augustus, however, introduced a law into the Senate, which limited the height of houses to seventy feet,³ on account of the frequent ruins which had occurred. After the burning of the city, Nero restrained the height of houses,⁴ although we are not told within what bounds. Lastly, Trajan limited the height of houses to sixty feet, giving as a ground the liability to fall, and the ruinous expense on such event taking place.⁵ Severus and Antoninus adhered to the same rule, which was also observed in Constantinople.⁶

§ 945.

*Servitus altius
tollendi.*

*How the public
law affects pri-
vate contracts.
Difficulties in
this respect.*

A *servitus altius tollendi* would arise in case of any one having agreed, or being obliged to permit another, to build an upper room or upper chamber on the top of his house ; but here a difficulty arises,—how could the public law, which restricted houses within a certain height, be infringed or altered by private compacts ?⁷ This probably was rather the remission of a service existing, as where a house was already within the height allowed by law, and by virtue of an agreement between the parties was not to be raised higher, and was to overlook the neighbour's house ; the abandonment of this contract would give a *servitus altius tollendi*, by rescinding the *servitus non altius tollendi*, by which it had been agreed that the house should not be raised to the full height allowed by law : *altius tollendi*, on the other hand, arises when a man promises to allow his neighbour to build his house higher than the laws passed simply for the reciprocal protection of neighbours permit.⁸

¹ P. 8, 2, 9, & 24 ; P. 39, 2, 26 ; P. 8, 6, 8, § 5.

² Suet. Aug. 89.

³ Strab. Geo. 5, 162.

⁴ Tac. An. 15, 42.

⁵ Aurel. Vict. Ep. Vit. Trajan, 13 ; Hein. A. R. 2, 3, 7.

⁶ J. Oiseb. ad Cail Inst. 2, 1, 3.

⁷ C. 8, 10, 12, § 1 ; P. 8, 2, 2.

⁸ I. 4, 6, § 2 ; P. 44, 2, 26 ; Carpzov,

Zeno's law contained several provisions with which¹ the neighbours were allowed to dispense, by a mutual understanding; one of these was, that whosoever rebuilt his house should retain *veterem formam*, and this is law in Constantinople at the present day;¹ he should not deprive his neighbour of light or prospect, except, indeed, he left a space of twelve feet between his own and his neighbour's house, or his neighbour permitted him by special contract so to build; if this permission was obtained by contract or prescription, *si longo tempore ita ædificatum habueram*,² a *servitus altius tollendi* accrued. Where the law was positive, and no option or power of dispensation was permitted, of course a private contract could not be allowed to interfere with public enactments.

Zeno's building act.

Solution of these difficulties.

The fact appears to have been that there were laws as between man and man, though of general application, dispensable by special agreement as far as regarded the contracting parties.

§ 946.

Servitus fenestrarum arose when one stipulated to make windows in his own or in the wall of another, in which it was prohibited by law to make any alteration without the neighbour's permission; this may, however, be included under *servitus luminum*.³

Servitus fenestrarum.

§ 947.

Servitus luminum was connected in a measure with the *servitus altius tollendi*. As it is an unpleasant thing to be overlooked,⁴ it is permitted to any one to obstruct the windows which his neighbour might choose to beat out towards his premises, and whereby he was so overlooked; whence the stipulation for the service *lumina uti nunc sunt, ita sint*. Again, it was sometimes agreed that a house should not be raised, without the consent of the neighbour, so as to obstruct the light⁵ or his prospect.

Servitus luminum.

§ 948.

The *servitus ne luminibus officiat* is by some distinguished from the above. The better opinion appears to be, that this ser-

Servitus ne luminibus officiat: various

P. 2, c. 41, Def. 10; Westphal. § 109-114; Glück Pand. 10 b. § 669; Dirksen in Savigny Zeitschrift, 2 b. § 417-420; Hever de Serv. p. 99-103; G. J. Ostendorp de Jur. Senkenberg, med. n. 1, Alt. Toll. Levan, 1830; Selchow de Serv. Alt. Toll. Rom. Ejuq. ad Germ. Hab.

¹ No house must be raised higher, or built of other materials, or with other lights than the former one, without special licence. The Turks introduced the use of wood to prevent their Christian subjects constructing fortifications, consequently the houses are supported on uprights, and the

scaffolding worked in as the workmen proceed downwards; the upper story being first completed and inhabited. But a house is legally completed when the roof is on, and cannot be disturbed; it is therefore a common fraud to raise a house a story higher than before during the night, and set on the roof, and thus surreptitiously obtain another story.

² C. 3, 34, 1.

³ C. 3, 34, 8; P. 8, 2, 40.

⁴ Paternul. Hist. 2, 14.

⁵ P. 8, 2, 3; P. ibid. 14 & 15; C. 3, 34, 8.

views as to the difference between this and the above service.

vice is requisite when a man beats out windows in his own wall to prevent their being subsequently built out, and that it is *luminum* when the windows are in a common wall or in that of another. A second opinion is, that whoso hath windows in his wall must obtain a *servitus ne luminibus officiatur*, but whoso first makes them should seek to obtain a *servitus luminum*. A third view of this question is, that whoso hath a *servitus luminum* can claim but the least possible necessary quantum of light, but whoso hath a *servitus ne luminibus officiatur* may insist that his light be not obstructed in the slightest degree.¹

§ 949.

Servitus prospectus et ne prospectui officiatur.

The *servitus prospectus* and the *servitus ne prospectui officiatur* has a great analogy with the foregoing, and the distinction between the two governed by the same rules. *Prospectus*, says Paulus,² *etiam ex inferioribus locis est, lumen ex inferiore loco esse non potest*. The light does not come from below, consequently one may build up level with a window without obstructing the light, although he may the prospect.

Difference between these two services.

Two of the greatest commentators³ are of opinion that there is no difference between *servitus prospectus* and *prospectui ne officiatur*, but a third⁴ affirms that the first applies to one who would beat out windows, the latter to one who hath already beaten them out. Lastly, Puffendorf⁵ thinks it a mere matter of degree, that by the first expression is meant that *some* prospect must be left, by the second that the prospect should not be in the least wise injured.

§ 950.

Servitus non prospiciendi.

Servitus non prospiciendi is founded on a promise made by a person not to look out of a window.⁶

§ 951.

The easement of ancient lights.

The *jus luminum*, or right of light, in England consists in the right every man has of free access for the sun's rays to his windows without obstruction from his neighbour, and this is acquirable by prescription, for although within the term of twenty years the occupier of an adjoining property may build up a wall on the boundary line, and so obscure the light or view of his neighbour's house, built within that period on such boundary, yet if he let that period elapse, an indefeasible right accrues to the occupier of such house, and his light and view must not be impeded. But a service of this sort may be conferred by grant, and for such easement a rent is usually reserved in the deed by which it is

¹ Höpfner, Com. ed Web. § 362, and authorities there cited.

² P. 8, 2, 16.

³ Donellus Com. Jur. Civ. lib. 11,

cap. 5; Noodt. ad Pand. tit. de 5 P. N.

⁴ Hunnius in res Sut. p. 307.

⁵ Tom. 1, Obs. 196, et Anamad. 33.

⁶ Voet. L. 8, T. 2, § 12.

granted, whereby the prescription is prevented from running, and an indefeasible right is barred.

§ 952.

Servitus cloacæ was the right of driving a drain through another's property.¹ The sewers were one of the most stupendous and best organized works of ancient Rome, the position of which upon seven distinct hills materially aided the work of Tarquinius Priscus.² A tax was imposed for cleansing them, termed *cloacarium*,³ and those condemned to punishments, on account of crimes committed, were employed in this work. These sewers, before the burning of the city by the Gauls, passed through public lands and ways, so that each house could get directly at them; but after that event, the position of the streets and individual houses having been changed, supplementary drains were also rendered necessary under the dwellings, which in the hurry of reconstructing were built without regularity or regard to the original plan:⁴ this gave rise to private drains⁵ discharging into the old public ones, which from the above reason must of necessity sometimes pass through the property of a neighbour; this rendered a stipulation to that effect indispensable, and was the origin of the *servitus cloacæ*. No obligation, however, lay upon the servient to allow *fæces* to pass through, but only the drain-age water.⁶

Servitus cloacæ.
History of the origin of drains, and of this service of the *cloacarium*. •

Fæces might not pass in a drain.

The right to have drains passing through another's property is also an English service, nor is it restricted as it was in Rome; any substance, excrement included, may be passed through such drains, the right being in the drain, without reference to its purpose.

In England no restriction.

§ 953.

Servitus fumi gives a right to conduct smoke into the upper parts of a house,⁷ and is the converse of the *jus stillicidii*.

Servitus fumi.

§ 954.

Servitus latrinæ arises when a person obtains the right to construct a secret chamber in a place and in a manner not permitted by the common law and statutes.⁸

Servitus latrinæ.

§ 955.

Servitudes, services, are either *affirmativæ* or *negativæ*: where the possessor of the *prædium serviens* is obliged, *aliquid pati*, to suffer something, the service is affirmative, as the right of way across another's ground; but where he must refrain from doing

Services are affirmative or negative.

¹ P. 43, 23, 1, pr. § 4.

² Liv. Hist. 1, 32; Dion. Hal. A. R. 3, 200; Cassiodor. Varr. 3, 30; Plin. H. N. 36, 15.

³ P. 41, 3, 27; P. 30, 1, 39; Traj. Imp. ad Plin. Epist. 10, 41.

⁴ Liv. Hist. 5.

⁵ P. 43, 23, 1, § 9.

⁶ Hellfeld, Jur. For. § 673.

⁷ P. 8, 5, 8, § 5-7.

⁸ Thib. l. c. § 701 & 754.

Negative. some act, the service is termed negative, as the prohibition to build in a certain position on own proper land.

Affirmative. An affirmative service by grant constitutes a mere *jus ad rem*, for the real service must accrue by the exercise—that is, the *dominans* must exercise his right at least once, with the knowledge and without opposition on the part of the *serviens*,¹ which amounts to a constructive delivery in *quasi traditio*, which cannot be had in the case of a negative service,² such as the obligation *not* to beat out windows.

To grant a valid service, the grantor must be the real owner of the *prædium serviens*, for if he have but a temporary, qualified, or limited estate, he can only grant a service dependent on his own title—that is to say, a *jus servitutis revocabile*.³

Servitus discontinua. A *servitus discontinua* is the converse of a *servitus continua*, the first being in force from time to time, the latter being uninterrupted.

Servitutis regulares or ordinariæ. Inasmuch as personal⁴ cannot be erected into real services,⁵ such are termed *regulares* or *ordinariæ*, but as the converse is not true, and real services can be made personal,⁶ such are termed *irregulares* or *extraordinariæ*.⁷

Irregulares or extraordinariæ. A real service, when for purposes of pleasure, must be applicable to every possessor of the dominant estate,⁸ then termed *prædium voluptuarium*.⁹

Servitus voluptuaria.

§ 956.

Distinction between real and personal services depends on the parties thereto.

The distinction between real and personal services consists in the parties thereto: a service of real requires two things, a *prædium dominans* and *serviens*, but if personal but one, a *res serviens*; secondly, personal consist, like real services, in a *jus in re*, and are not confined to a mere *jus ad rem*; thirdly, they are confined to the person of the grantee, nor do they pass to his heirs without express limitation; in like manner, they are inalienable by sale or gift, nor has every owner of a certain estate claim to them as of common right.

All services except usufruct use habitation, and the duties of slaves can be granted as personal or real.

§ 957.

Usufructus is the right to the profits of another's property, without damage of the substance.

Usufructus est jus alienis rebus utendi fruendi, salva rerum substantia.¹⁰ Usufruct is, then, the right of using the things belonging to another, without infringement of their substance; it is, moreover, a corporal right dependent on the title of the real

¹ Vin. ad I. 2, 3, § 4.

² Puffendorf, T. 1, Obs. 32, § 14.

³ C. 4, 51; P. 8, 6, 11, § 1.

⁴ Inst. L. 2, Tit. 4, § 5.

⁵ P. 8, 1, 1, 1; I. 2, 4, § 1.

⁶ P. 8, 3, 5, & 6; P. 43, 20, 1, § 12;

P. 34, 1, 14, § ult.; Glück Pand. 9 B. S.

19, 20; Schweppe, Rom. Priv. R. 2 B. S.

181-2; Mühlenbruch im Archiv. f. Civ. Prax. 15 b. 3 Hft. S. 382-92.

⁷ Löhr. Mag. 2 b. 4 Hft. § 495-7.

⁸ P. 7, 1, 13, § 5; P. 8, 2, 3, 15, 16, authorities cited by Thibaut, l. c. 752, n. f.

⁹ P. 43, 20, § 11 & 3 pr.; P. 8, 1, 8, pr.

¹⁰ P. 7, 1, 1.

proprietor ; for *usufructus*, says Celsus, *est jus in corpore quo sublata et ipsum tolli necesse est*.¹

Usufruct is the right to consume what the property of another produces, without damage to the substance, as the crops of an orchard or of a farm ; hence usufruct includes use, from which it is clearly inseverable.

Usufructus is the use with the right of consumption.

Thus *usus* could be willed without the fruit, but not *à converso*,² because fruition implies consumption of the object without reservation even of the substance ; and as in this case nothing would remain, it is clear the legacy would be of none effect ; but a use willed without fruit is limited by the mere necessity of the user, and not only ought the substance of the thing to be intact, but its condition also :³ thus use contained less than usufruct, and could not be willed in part as the latter could,⁴ neither could it be transferred, by gift, hiring, or other mode, to another party, like usufruct.⁵

Usus could be willed without the fruit.

The origin of the right of usufruct is supposed to be founded in the law of last wills : by this contrivance a life-interest was left to a party without any remainder to his heirs, since at his death the usufructuary right became reintegrated with the property ; but, at a later period, usufruct became acknowledged by law by means of a stipulation followed by tradition:

Origin of right of usufruct.

Usufruct was in the beginning confined to bodies only, but was subsequently permissively extended to quantities and incorporeal rights, the fructuary, as he was termed, undertaking to restore like quality, quantity, measure, or value,⁶ at the termination of the usufructuary contract,⁷ which has been hence termed a *quasi usufructus*. *Usufructus jure civili legari potest earum rerum, quarum salvâ substantiâ utendi fruendi potest esse facultas et tam singularum rerum, quam plurium, id est, partis. Senatus consulto cautum est,⁸ ut etiam, si earum rerum quæ in abusu continentur, ut puta vini, olei, tritici, usufructus legatus sit, legatario res tractatur, cautionibus interpositis, de restituendis eis, quum usufructus ad legatarium pertinere desierit.*

Usufruct confined to bodies, and subsequently to quantities, termed quasi usufructus.

Termination of usufruct by condition.

The rights of the usufructuary consist principally in the use of the chief object and its appurtenances ;⁹ in the property in all natural or civil proceeds thereof ;¹⁰ in the inability to transfer by cession ; in the ability to transfer the exercise of rights.¹¹ Hence it follows that an accretion which is no fruit does not accrue to

Right of the usufructuary.

¹ P. 7, 2.

² P. 7, 8, 14, § 1.

³ P. *ibid.* 12, § 1.

⁴ P. *ibid.* 19.

⁵ I. 2, 4, § 1.

⁶ P. 7, 5, 7, 8 ; I. 2, 4, § 2.

⁷ Ulp. Fr. 24, 26, 27 ; P. 7, 5, 1 ; P. 33, 2, 24 ; P. 7, 9, ult. ; P. 35, 2, 69 ; C. 3, 33, 1.

⁸ This actum. is of a period subsequent to Cicero ; for, in Top. 3, usufructus is made applicable to bodies, not to rights and quan-

ties. But Masurius, Sabinus, Nerva, and Cassius commented upon it, P. 7, 5, 5, § 1 & 3 ; and as they flourished under Tiberius, it is probable that it dates under Augustus, Vid. et Heinec. A. R. 2, 5, § 7.

⁹ P. 32 (3), 91, § 5 ; P. 7, 15, § 6 ; P. 7, 6, 1 ; Voet. L. 7, T. 1, § 27, et seq.

¹⁰ P. 7, 1, 7, § 1 & 9, & 59, § 1-2.

¹¹ P. 19, 2, 12, § 2, 3, & 9, § 1 ; Stepper de Locat. et Conduct. Usufr. Lyn. 1728.

the usufructuary, neither a treasure to the child of a slave,¹ accession to the estate which may be clearly distinguishable,² but the usufructuary may, to carry out his right as such, change the form of a piece of fallow, if it be done in a judicious and advantageous manner,³ constructing buildings for harvesting produce, but for no other purpose.⁴ But, generally, he must not change the form of buildings,⁵ even though he be specially permitted to ornament and improve, neither may he complete such as are in an unfinished state;⁶ hence it appears that the usufructuary has only received the use of a building, even although it may be useless to him by reason of its unfinished state.⁷

§ 958.

Usus is the using a thing without prejudice to the substance, and is *minus plenus*, and *plenus*.

Re uti is to use a thing without prejudice to the substance, as for instance to ride a horse or wear a garment, and this is therefore termed *usus minus plenus*, or the using a thing only as far as strict necessity requires. *Re abuti*, on the other hand, is to consume in the using, as to ride the horse to death or wear out the garment; this is *usus plenus*, and includes the using a thing not only as far as necessity requires, but also for the purposes of convenience and pleasure, but is not to be confounded with *misuse*.

Usus counted among personal services, and exercised in three ways.

Usus, the use of a thing, is counted among personal services, *servitutes personales*, and may be exercised in three ways. A thing may be so used as to be consumed in the using;⁸ secondly, so that its condition is not changed;⁹ and, thirdly, so that the object itself is neither consumed nor perish in the using.¹⁰ The word *utor* implies a necessary use, while *fruer* rather conveys the idea of a thing being devoted to the purposes of pleasure or luxury;¹¹ it, moreover, denotes more especially that species of usage first mentioned, by which the substance itself is consumed, which is by no means the common signification of *usus*, which must therefore not be confused with fruition.

Difference between *utor* and *fruer*.

Usus confers no right to fruits.

Usus per se confers no right to the fruits, although many changes took place in this respect in later times by means of common and inexact expressions, and the rules of interpretation, to the end that no needless impediment should be thrown in the way of business.

Right even beyond the limit of common requirement.

If the object, then, be such as bears no fruit, the *usuarius* possesses a perfect right of use even beyond the limit of his actual requirements, at the same time he must not cede the exercise of his rights altogether to another.¹²

¹ I. 2, 1, § 37; P. 7, 1, 68; Bynkenhoek Obs. L. 5, c. 7; Meister Prolus ad L. 28, § 1, de Usur. 68, pr. de Usufr.

² P. 7, 1, 9, § 4; Bynk. L. 5, c. 1.

³ P. 7, 1, 13, § 5; Voet. § 24; Glück Pand. 9 B. § 653; contra Feuerbach Civil Vers. 1 B. n. 4, & Madai, im Archiv. Civ. Prax. 15 b. 3 Hft. nr. 16.

⁴ P. 7, 1, 13, § 6, 7.

⁵ P. 7, 1, 13, § 4-7, 8; P. 7, 1, 44.

⁶ P. 7, 1, 6.

⁷ P. 7, 1, Arg. 13, § 6; Emminghaus ad Cocceii, L. 7, T. 1, qu. 7, n. m.

⁸ Hor. Epist. 2, 2, 190.

⁹ P. 7, 2, 2, 15, § 1 & 5.

¹⁰ Donat. not in Ter. Prolog. And.¹

¹¹ Sen. de Vit. Beat. 70.

¹² P. 7, 8, 4, pr. 14, 16, § 2, 20, 22, § 1.

If the object be of a productive nature, it can be used without the enjoyment of the fruits being necessary to enable the usuary to exercise his rights, who receives, then, none of the fruits;¹ if, on the other hand, he cannot fully exercise his rights without usufruct, he is permitted to use so much as is requisite for the necessities of himself and those who belong to him,² nor does the use of *res fungibiles* differ from the usufruct of them;³ the usuarius, however, as the sole person benefited, must bear the burdens incident thereto.

Perception of fruits depends upon the possibility of exercising rights.

§ 959.

Habitatio is in its basis very similar to *usus*, and has a certain analogy to *usufructus*, but it differs in respect of intensity from the first, for there is more in habitation than in use, for whoso hath the right of habitation can not only inhabit the whole house,⁴ but let it out on hire for habitation, but for no other purpose, although it is doubtful whether he may do so gratuitously,⁵ which is not permitted to an *usuarius*; on the other hand, he has a more restricted right than the *usufructuarius*, who may let for other purposes. Whoso hath this service may not only use the house for his necessities like a *usuarius*, but may also have chambers purely for pleasure. If a *jus habitationis* be conferred in *perpetuum* on any one *donatione inter vivos*, the grant is nevertheless revocable by heirs.⁶ But the right is not extinguished, as in the case of *usus*, by *non user*, or by *capitis deminutio*.⁷

Habitatio resembles *usus* and *usufructus*.

Habitatio, then, is a real right to inhabit the house of another without injury to the substance, and differs from the *servitus habitationis*, and the tenant has a mere *jus ad rem* as against the landlord. The old jurists disputed as to the nature of this service, the Sabinians holding it to be a *usus*, the Proculeians a *usufructus ædium*, but Javolenus contended it was a peculiar service, differing from both, which view Justinian has adopted.⁸ *Sed si cui habitatio legata sive aliquo modo constituta sit, neque usus videtur neque usufructus, sed quasi proprium aliquod jus: quanquam habitationem habentibus, propter rerum utilitatem, secundum Marcelli sententiam, nostra decisione promulgata permissimus non solum in ea degere sed etiam locare.* In England a leasehold is a chattel interest, and a chattel real because it savors of the reality.

Differs from *servitus habitationis*.

Justinian makes it a peculiar service.

§ 960.

Both usufruct and use, and habitation, exist in the English law, under the denominations of leasings, holdings, &c. The owner

Usufruct and habitation in the English law.

¹ P. 7, 8, 12, § 2, 3, 4; I. 2, 5, § 4.

² P. 2, 5, 12, pr. 1 & 22, pr.

³ P. 7, 5, 5, 2.

⁴ Some jurists assert he can only use the parts strictly adapted to habitation, consequently neither cellars, store-rooms, nor summer-houses, &c.; but this has been

held not proven, although Heineccius supports this view, A. R. 2, 5, § 5.

⁵ C. 3, 33, 10.

⁶ P. 39, 5, 27, & 32; Lynker de Jur. Hab. Voet. L. 7, T. 8, § 7; Wissenbach Disp. vol. ii. D. 16, § 16.

⁷ P. 7, 8, 10, pr.

⁸ C. 3, 33, 13; I. 2, 5, § 5.

of the fee may let his land or house, for the difference of the Roman law does not exist in this respect. If by lease, the letting is ruled by the conditions contained therein; if by yearly hiring, by the common law applicable to such cases. The *usufructuarius* of the Roman law corresponds to the tenant, and the *dominus* to the landlord of the English law. A lease, however, is assignable at law in England, which it was not in Rome; and so far from it not being permitted to finish an unfinished house, the tenant, whose lease requires him to keep his house in good repair, is bound to deliver it up, not in the repair in which he received it, but in good repair, without reference to the condition in which he first took possession of it. Special contract in most cases supersedes these questions, and disputes more often arise on the construction of the deed than upon the common law right, and are thus transferred to another category.

§ 961.

Operæ servorum,

differed from usufruct and use.

Operæ servorum is a service of a purely personal nature, and consists in a right to the service of the slave of another, which, inasmuch as it only extends to the use of the labor of the slave, is to be distinguished from usufruct and use.¹ One peculiarity of this service is, that it is hereditary² and indivisible.³ Of like nature is the right to the labor of animals, *operæ animalium*.⁴

¹ P. 7, 7, 1, & 5.

² P. 33, 2, 2.

⁴ P. 7, 9, 5, § 3; Schweppe, Rom. Priv.

³ P. 35, 2, 1, § 9; P. 38, 1, 3, § 1; R. 2 B. S. 199.

P. 45, 1, 72.

TITLE VIII.

Modi Adquirendi—Naturales—Possessio—Occupatio—Occupatio Bellica—Inventio—Dere-
lictio—Lex Rhodia de Jactu—Accessiones Naturales—Insulæ in Flumine Natæ—Vis
Fluminis sive Avalsis—Alvei Mutatio—Fructus Ancillæ—Accessiones Industriales—
Specificatio—Pictura—Confusio—Adjunctio—Commixtio—Inædificatio—Scriptura—
Accessiones Mixtæ—Satio—Implantatio—Fructuum Perceptio—Mancipatio—Translatio
—Quasi Translatio.

§ 962.

IN the preceding title the nature of things has already been treated of, it now remains to show by what means these things can be acquired, and subsequently the right of property in them termed dominion.

Modi adqui-
rendi res.

To things *extra patrimonium* it will be unnecessary further to allude. *Res communis publicæ universitatis* are *humani*, and *res sacræ religiosæ*, and *sanctæ, divini juris*; but both of these, being incapable of individual possession, are not acquirable by private persons, and as a natural consequence cannot be *in dominio*.

Res extra patri-
monium, being
incapable of pos-
session, are dis-
missed;

The things, then, to be treated are those *in patrimonio*, and these are also *humani juris*, being *corporales*, such as *mobiles* (*fungibiles*), *mancipi*, and *nec mancipi*; or *immobiles*, always connected with land, being either *mancipi* and *nec mancipi*, for this term applies to both, as has been seen; or *incorporales*, such as *servitutes reales*, which are *rusticæ* or *urbanæ*; or *personales*, such as *usufructus*, *usus*, *habitatio*, or *operæ servorum*.

but res in patri-
monio are capa-
ble of possession,
their denomina-
tions being cor-
poreal and incor-
poreal.

§ 963.

Possession is so important an ingredient in acquisition, that it will be necessary to allude to it before proceeding to the modes mentioned in the Institutes. Possession regarded as a fact resembles occupancy, but in its abstract sense it does not belong in this place, but will be treated of in the succeeding Title under Rights.

Possessio facti.

Savigny confutes the maxim *Possessio non est juris sed facti*, and holds possession to be right and fact combined. The clearest way of explaining this is, first, to consider possession as a fact, that is, in its meaning of corporeal holding with intention to hold; and, secondly, in its abstract and legal sense as a right; hence, in one point of view *possessio est facti*, in another, *juris*, and in a third

juris et facti; the first of these three belong to this place as a species of occupation.

Detentio requires no animus retinendi.

Detentio differs from this possession, whereof it is but one element, for it does not imply that other and important one, the *animus retinendi*.

Possession consists in the physical power, and in the intention to detain.

Possession consists, first, in the *physical* power of disposing of an object,—nor is the right material to possession, for possession differs widely from right; secondly, the *animus retinendi* is material, but it signifies not whether the possessor intends to retain the object for a limited time, merely under the assumption that it is his own property, or not; nevertheless, there is no possession where the *animus retinendi* is entirely wanting. Thus, if a person take an object into his hand for the purpose of mere examination, he is not a *possessor*, but a mere *detentor*; in like manner, an object casually left in the house of another constitutes the owner a *detentor*, and no more. *Qui jure familiaritatis*, says Paulus,¹ *amici fundum ingreditur, non videtur possidere; quia non eo animo ingressus est, ut possideat, licet corpore in fundo sit*. It is not sufficient that an act be done with the view of gaining possession, for so long as there is the least doubt as to the result there is no possession, for that consists in the physical act joined with the intention, which is summed up in the expression, *rem contrahere animo retinendi*.

Hence, Paulus² correctly lays it down that *feræ in vivariis*, wild animals in confinement, *pisces in piscinis*, fish in trunks, where they can at any moment be seized, are in possession; but not so wild animals in a park *quæ in sylvis circumseptis vagantur*, or fish in a pond *in stagno*, from which the water cannot be drawn off, for then there is too much uncertainty.

The cessation of either the physical possession, or the intention to detain, destroys the possession.

§ 964.

The duration of the physical power of possession.

The physical power of possession endures so long as circumstances permit a person the free disposal of an object without another having authority to deprive him thereof, for the intervention of the authorities is sufficient evidence that physical possession has been lost.

As to immoveables.

With respect to immoveables, if a party covertly, or by force of arms, assumed the possession of another's property, he may be expelled by force, if done³ as soon as the fact become known; but it is otherwise in the case of moveables, for no man has a right to regain the possession of a moveable by force, he must seek his remedy in an action. Hence the possession of an immoveable is

Moveables cannot be regained by force.

¹ P. 41, § 41.

² P. 41, 2, 3, § 14; Grot. de J. B. et P. 2, 8, § 2; Puffend. de Jur. Nat. et Gent.

4, 6, § 11; Noedt. Obs. lib. 2, c. 21; Crell. Dis. de Vivariis, § 9.

³ P. 41, 2, 25.

lost by the owner knowing that a *usurpator* is in possession and not immediately thereupon ejecting him, or by failure in the attempt to do so, for then recourse must be had to the law to oust such adverse possessor. But the possession of a moveable is lost on its passing into the hands of another, no matter by what means or by what agreement. English lawyers express this by the phrase, the lien passes with the possession. Here lien expresses the physical capacity to hold; and if a man give another a piece of money for the purpose of being changed, and the receiver detain it, a question of debt arises between the parties, the money having been parted with willingly.

The possession of an immoveable is lost by neglect to eject.

Lien.

The distinction between moveables and immoveables arises clearly *ex necessitate rei*. A man may enter and occupy the house of another, and hold it against the owner's consent, but he cannot be said to so occupy his moveable or chattel; for in the first case a consent may be presumed, and continue to be so presumed, until the contrary is shown by some overt act of the owner; but in the second, the overt act should take place at the time of the improper assumption, and if it do not take place, then a tacit consent is presumed.

The distinction between moveables and immoveables arises *ex necessitate rei*.

§ 965.

The Institutes enumerate three natural modes by which property may be acquired:—*occupatio*, *accessio*, to which some civilians add *fructuum perceptio*; and lastly, *traditio*. Grotius¹ distinguishes acquisition into original and derivative; of the former description is *occupatio*, *inventio*, or finding *alluvium*, and the like; and the latter, modes by which a vested property is transferred, as by gift, sale, or exchange.

Natural modes of acquisition.

With respect, then, to the first of these divisions; the general rule obtains *res nullius cedit occupanti*; or, according to the Digest, *quod nullius, est in bonis, id ratione naturali occupanti conceditur*.² Hence that which belongs to no particular proprietor becomes the property of the possessor by right of common occupancy; from which divine and holy things, before discussed, and those of a public nature, although *nullius in bonis*, are excepted.

The second mode, accession, follows a principle undoubtedly founded on natural law; namely, that whatsoever property produces naturally belongs to the same owner as such productive object, which supplies one of the leading maxims of the civil law, *accessorium sequitur principale*.

Accessio.

Modern civilians insist that *fructuum perceptio*, or gathering, is a mode of natural acquisition differing from accession, and under which it cannot be reckoned, because there is no annexation, but, on the contrary, a severance.

Fructuum perceptio.

The third mode is tradition, which appears rather a civil than a natural right, yet Justinian says, *Nihil enim tam conveniens est*

Traditio.

¹ L. iv. 6, § 1.

² P. 41, 1, 3.

*naturali æquitati quam voluntatem domini, volentis rem suam in alium transferre ratam haberi, et ideo cujuscunque generis sit corporalis res tradi potest et a domino tradita alienatur.*¹

§ 966.

Occupation
generally.

Occupation arises out of natural law, of which it is a maxim that any one may occupy an object which has no owner—referring to the original state of mankind, and the inherent right of taking from the common stock a sufficient quantity of whatever may be necessary to subsistence. This question is fully explained by Blackstone,² to which the reader may refer, as it would be foreign to the object of the present work to recapitulate his detailed elucidation of this point. It suffices to remark, that inasmuch as this right exists only during life, and is of necessity the law which allows a man to inherit from his parents by succession or testament, must be based on civil right.

Occupation, particularly the three requisites thereto.
Seizure.

Occupation is the seizing of a corporeal object which has no owner with the intention of appropriating it.

The first requisite of occupation is *adprehensio*, or seizure, and the strictness with which this word is to be construed depends in some measure upon the nature of the object into which the question of certainty also enters. If the object be so far within control that it is merely necessary to declare the intention of appropriation, as in the case of a hunter who has killed an animal,³ such seizure is sufficient, for it cannot escape his possession; but a piece of floating timber is not occupied until secured by being brought ashore, lashed to a fixed object, or anchored. Notwithstanding which, with respect to minerals in the field, it suffices to declare the intention of appropriation in the presence of the object, but not in its absence.

Corporality.

That the second requisite is corporality is clear, because no other is capable of apprehension, consequently rights cannot be acquired by occupancy.

Vacancy.

The third requisite is vacancy, that the object have no owner—that is, that it be in the state in which it was at the beginning of the world, and before the existence of the human species. Things may be without owners by nature, as wild animals, uninhabited islands, and the like; or they may become so by dereliction or intentional abandonment, or by reason of the impossibility of finding the true owner, as money buried, whereby it has become *res nullius*; and it is an established rule that *quod nullius est in bonis id ratione naturali occupanti conceditur*.⁴

The most convenient mode of classifying objects acquired by occupancy will be under wild animals, things taken in war, and things found.

¹ I. 2, 1, § 40.

² Com. B. 2, c. 1, p. 3, 8; B. 2, c. 16, p. 258; B. 2, c. 26, p. 400.

³ P. 41, 2, 1, § 21.

⁴ P. 41, 1, 3.

§ 967.

Animals are either wild, *feræ*, tamed, *mansuetæ*, or of a tame nature, *mansuetae naturæ*, and the distinction which is acknowledged the foundation whence certain distinctions are drawn.¹

Wild animals, *fera animalia*, are such as live in natural freedom, avoid mankind, and when taken endeavour to free themselves from restraint; but when such animal, having been caught and shut up, has changed its wild nature, and no longer tries to escape, *si ex consuetudine abire et redire solet*, it is called *mansuetafactum*, tamed.

Tame animals, *mansuetae naturæ*, are such as do not wander, but live in the company of mankind, as oxen, sheep, dogs, &c. Nevertheless, the animal that is tame in one country may be wild in another, and the same *genus* may consist of wild and tame species, as in the case of swine, geese, and ducks.²

Bees, peafowls, and pigeons, are instances of tamed, not tame animals,³ and this passage in the Institutes imports that they only belong to the owner so long as they fly away and return, but are wild by nature; nor if they have settled upon your trees do they, in the case of bees, belong to you till you shall have covered them⁴ with a hive, no more than the birds which have built their nests there, or the young in those nests before taken: hence it is lawful for any one to take the honeycomb thence, though a prohibition lies against a trespass on the land; if, however, bees be once hived the honeycomb belongs to the possessor, and although the swarm leave the hive the property in them continues so long as they remain in sight, or there be a reasonable probability of their recovery. It may be questioned if house-pigeons and peafowls in a yard are not to be looked upon rather as tame animals.⁵ The provisions of the Roman law are, however, perfectly clear.

§ 968.

Wild animals, be they beasts, birds, or fishes,—in short, whether of the earth, air, or water—vest by the law of nature in him who first takes them in virtue of the *adprehensio*. Nor does it matter on whose land, or whether with or without the owner's consent, since the locality involves another and an entirely distinct question. *Et nec interest feras bestias et volucres, utrum in fundo suo quis capiat, an in alieno. Plane, qui alienum fundum ingreditur, venandi aut aucupandi gratia, potest a domino, si is præviderit, prohiberi, ne ingrediatur*,⁶ and an action of trespass will lie for damages done to crops or the like, and the value recovered against the trespasser, for the owner cannot forbid the *actus occupationis*, but only the *actus ingressionis*.

Feræ naturæ, mansuetæ, mansuetae.

Fera animalia.

Animalia mansuetafacta.

Mansuetae naturæ.

Of bees, peafowls, pigeons, &c.

Wild animals may be taken anywhere, subject to the law of trespass.

¹ The terms *mansuetum* and *mansuetafactum* are sometimes confounded.

² Leyser Spec. 440, m. 1.

³ I. 2, 1, 15.

⁴ I. 2, 1, 14.

⁵ Puff. de Jur. Nat. et Gent. 4, 6, § 5.

⁶ I. 2, 1, § 12; P. 47, 10, 13, § 7, ad fin.

§ 969.

Wild animals
captured may
again become
res nullius.

Such beast remains then the hunter's property, so long as he can retain possession; but if it escape, it again becomes *res nullius*: escape is understood to be perfect when the object shall be out of sight, or it be not probable that the pursuit will be successful.

If the birds or beasts be slightly wounded, they are not held to be taken, for they may still escape and become the property of him who seize them, *quia multa accidere solent ut feram vulneratam non capias*; unless, indeed, there be a custom to the contrary, such as generally obtains among huntsmen, of which the judge shall determine according to such circumstances as may appear; for Justinian¹ decided an entire caption, *manu et laqueo*, to be necessary; and if a hawk be known by his bill, or a stag by something usually worn about his neck, he shall be sent back to the owner.²

If a wolf take a lamb from a shepherd, and another rescue it, it shall be returned to the shepherd, if the possibility of his recovering it remained, otherwise not; and the same in the case of shipwrecked goods, an action for recovery lies.³

A beast which
escapes a snare
becomes *res
nullius*;

Again, if a wild beast be taken in a trapper's snare,⁴ and another take and release it, the first consideration that arises is that of place—whether public or private. If the latter, whether it belong to the trapper or to another; if to another, whether there was consent or no; whether the beast could or not have escaped by struggling. If on the trapper's own ground, or on that of another by his permission; and if it were unlikely that the beast could escape, an action lies for taking him away or setting him free.

not so with
regard to tame
animals.

With respect to tame animals, *mansuetae naturæ*, the case is different—such as fowls, geese, and the like, which, if they be disturbed and fly away even out of sight, are still yours, and the detention of them with the intention of profit, *lucri causâ*, is theft.⁵

§ 970.

The right of
chase is common
by natural law,
the law of na-
tions, and the
civil law, but
may be restricted
for the public
advantage;

With respect to the restriction in the right of the property in animals *feræ naturæ*, by positive law it is urged that to hunt, fish, and fowl in public places is originally permitted by the laws of all nations,⁶ and confirmed by the civil law,⁷ as convenient for the furnishing of public markets; and, consequently, that a prince acts injuriously to his subjects who prohibits the free exercise of this natural liberty, unless it shall have been resigned by consent. The subsequent and later law of most nations has, as well as immemorial custom, however, vested this

¹ I. 2, 1, 13.

² Ibid.

³ P. 41, 1, 44.

⁴ P. 41, 1, 55.

⁵ I. 2, 1, 16.

⁶ I. 2, 1, 12.

⁷ P. 5, 6.

power in princes. The ground is,—that princes have the same authority in public places held of them, as private persons have in their own particular estates. This power, too, may be for the common good : first, for the preservation of the several species of untamed creatures, which would soon become extinct if a general liberty of chase was allowed ; and because, in a civilized state of society, neglect of husbandry and trade by the mass of the population would follow : again, the hunting of wild beasts and other untamed creatures is frequently attended by a crowd of idlers in arms, which may be injurious to the public peace, and give rise to quarrels and contests with the owners of the soil, as well as respecting the division of the game in a case where all may pretend to an equal share. Hence the feudal law determined that, whatever accrues by hunting, fishing, or fowling, does not belong to the occupant, but to the prince or those who claim under him ; for this power of the prince is now allowed to extend even to prohibiting private persons from hunting on their own estates without due license, which is, in fact, the real foundation of the English game laws.

and has been vested in the head of the state,

by the feudalists, which is the

origin of the English game laws.

§ 971.

Occupancy, as far as it concerns real property, is much restricted to a single instance by the laws of England ; namely, where a man was tenant *pur autre vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died without alienation during the life of the *cestui que vie*, or him on whose life it was holden : he who could first enter on the land might lawfully retain the possession as long as the *cestui que vie* lived, by right of occupancy, and in this respect resembled the *hæreditas jacens* of the Romans.¹

Occupation occurs but in one instance in the English laws.

The grantor having parted with all his interest during the life of the *cestui que vie*, it did not revert to him ; neither did it escheat to the lord of the fee, for all escheats must be of the whole and entire fee ; nor to the deceased's heirs, for there were no words of inheritance in the grant ; nor to his executors, for they could not succeed to a freehold. The statute of frauds² have in effect abolished the title by common occupancy by making such estates (sec. 3) devisable by will ; or heritable as assets by descent (6) ; or failing a special occupant, vesting it in administrators and executors.

Under the above circumstances, with this difference that the grant were to a man and *his heirs, pur autre vie*, such heir would succeed by *special occupancy*, which is the law to this day.³

Thus, there being no estate of inheritance, the heir cannot strictly be said to take by *descent* ; others, however, maintain he

¹ Co. Litt. 416, as to title by occupancy, vide *Geary v. Bearcroft*, Carter 59, Vaughan 187.

² 29 Car. II. 3 ; 14 Geo. II. ; 7 Will. IV. ; 1 Vic. 26.

³ *Atkinson v. Baker*, 3 T. R. 229, as to heirs and executors.

does, calling his estate, though clearly no fee, a descendible freehold.¹

English law of
occupancy.

The title by common occupancy does not extend to copyhold, for the estate, says De Grey, C. J., is never out of the lord ; yet it does not follow there can be no special occupant, when the lord has granted the estate to one and his heirs during the life of A. B., and in all others a very forced and improper phrase ; and there is great force in what is said by Vaughan, that the heir takes it as a descendible freehold. Such, however, is the language of the law.

§ 972.

Occupation by
right of con-
quest.

Occupation by war, *occupatio bellica*, is founded upon the *adprehensio* by one state of the property of another, as a state without respect to its component members, on the ground of indemnity for an insult offered, and with a view of safety for the future. The property of an enemy cannot be termed *res nullius*, although in the same category.²

The war must
be legal.
As to moveables,
the capture must
be complete ;

Such right of occupation cannot accrue in a civil or intestine war, for this is no *bellum justum* ; nor even in a *bellum justum* between belligerents with respect to moveables, until they have been reduced into actual possession within the fortified places of the other ;³ or with respect to immoveables, until they shall have been so surrounded with fortifications as not to be resumeable without the destruction of such protecting works,⁴ for a simple act of volition is not sufficient. Pomponius⁵ says that immoveables accrue to the belligerent power *ager hostium publicatur*, that is, *republicæ acquiritur* ;⁶ but it appears that moveables belong to the individual soldiers, under the head of booty distributed by the conquering prince, whence the feudal practice probably originated. This, however, must be denied in all cases where plundering has been forbidden. Upon this point a great variety of opinion exists among the jurists. Höpfner⁷ thinks that what one individual has taken from another under such prohibition is his own, otherwise where a corps collectively has taken it, and that then it belongs to the state. But surely where there has been a prohibition of plunder, things so wrongfully taken still belong to the original owners ; but if they cannot be found, to the conquering state, rather than to individuals, who have acted against the obligation

and as to im-
moveables,
wholly in power.

Höpfner's view
of the law of
occupancy by
conquest.

¹ Vaughan, 201 ; 2 W. Bl. 1150 ; 6 T. R. 291 ; 7 Bing. 188.

² Pauli Diss. de Jur. Prin. circa res nullius, c. 1, § 30.

³ P. 41, 1, 5, § 7 ; L. 2, 1, § 17, however, appear to assert the contrary, *quæ ex hostibus capimus jure gentium statim nostra fiunt* ; but when may they be said to have been taken ?

⁴ P. 49, 15, 5, § 1 ; Ibid. 19, § 3 ; Ibid. 30 ; Voet. Pand. 49, 15, § 3.

⁵ P. 41, 1, 20, § 1 ; vide et P. 6, 1, 15, § 2 ; P. 21, 2, 11.

⁶ We have seen, in a former part of this work, § 90, that the system of appropriating a part only of the lands of a vanquished people was practised by the Romans, and adopted by subsequent barbarous Teutonic nations.

⁷ L. c. § 302 ; vid. et Cujac. Obs. lib. 19, c. 7 ; Donell. Com. lib. 4, c. 21 ; Merenda Controv. lib. 1, c. 22 ; Ziegler de Jur. Maj. lib. 1, c. 23, § 79 ; Vinn. ad § 2, 1, § 17.

imposed upon them, and that to appropriate them is a theft upon the state to which the soldier so wrongfully taking them belongs.

§ 973.

The *jus postliminii*, which has been before alluded to,¹ particularly with respect to persons, is the reacquirement of rights lost in war. Thus, if an enemy seize land and fortify it, but afterwards abandon the possession, the land reverts into its original dominion; but if the object captured, being moveable, be recaptured after the enemy has obtained full possession of it, as remarked in the above paragraph, it must be redeemed from whoso may have recaptured it, for the right is lost, and *postliminium* does not operate; if, however, it has not been so reduced to possession, the original rights revive with the recuperation. Things are said to be recovered, persons to return *jure postliminii*.

Postliminium revives the prior title to inanimate things.

Definition of *postliminium*.

§ 974.

Inventio, or finding, is properly of inanimate things, and may be considered either with respect to all things whatsoever, whether moveable or immoveable, which were never in the possession of any person, as an island in the sea,² precious stones and gems in the sea or on shore, being on the surface, which, by the law of nations, belong to him that finds them first; for it is not sufficient that the finder first see or move toward them, but that he be the first to lay hands on them if moveables, or if immoveables to make an entry;³ or with respect to those things which are left by their owners, as treasure privately hidden and derelicts.⁴ Treasure of all descriptions, which has been concealed during a long time, so that the proprietor of it is unknown, *cujus non extat memoria*,⁵ and cannot be discovered, belongs entirely to the finder; but several cases may arise with regard to the place and person finding: as to the first, let the object be supposed to be found by the proprietor of the land on his own ground; in this case, there can be no doubt of its being his. The finder may, however, discover the object on land which has no particular owner, such as a *locus religiosus*; if he do so without the help of witchcraft, conjuration, or magic,⁶ the thing is likewise his without impeachment; if, however, he shall have used such illicit arts, he has incurred the penalty of death, and the forfeiture of the object to the fiscus. When the treasure is found upon the ground of another by mere chance, as a farmer may do in ploughing ground, half belongs to the finder and half to the owner of the soil; if the land be private, this moiety accrues to the proprietor of the soil; if public, to the crown or city to which such land belongs. But if the finding resulted from a deliberate search in the land of another, the

Acquisition by finding its condition.

The owner must be unknown.

The various conditions which may arise if found in a *locus religiosus*.

Things found by chance on another's ground.

¹ § 406, h. op.

² L. 2, 1, 18 & 22; P. 41, 1, 7, § 3.

³ P. 41, 2, 3, § 3; C. 8, 41, 13.

⁴ P. 41, 7, 1 & 2, § 1; P. 41, 1, 44.

⁵ P. 41, 1, 31.

⁶ C. 10, 15.

object then wholly accrues to the owner of the soil ; and a person who pays a mere canon by way of rent¹ for a long term of years is, for this purpose, held to be owner of the soil.

Difference between accident and deliberate search.

The distinction drawn between accident and deliberate search arises out of the supposition, that in the latter case the finder had so much reason to believe the existence of the object that it could not be said to be lost or abandoned, consequently the appropriation of it by another is punishable as a theft.

Why a finder on another's ground has only a right to half the thing found.

But why, it may be asked, is such finder allowed only half, and not the whole, by the right of occupancy ? This may probably be explained by the conflict which here arises between the right of occupancy by which the object belongs to the finder, and that of accession by which it belongs to the owner of the soil.

A person employed to search has no claim to the object found.

With respect to the finder, if a man employ a workman to seek for a hidden treasure, such, when found, wholly accrues to the employer, because he had some information or suspicion of its presence, and the presence of the workman was not a mere accident ; but if such workman, being employed for another purpose, casually find a treasure, he has a claim on it to the extent of a moiety.

§ 975.

The English law of finding.

The English differs from the Roman law in that a *thesaurus inventus*, in English termed *treasure trove* or found, be it money or coin, gold, silver, plate, or bullion, hidden in the earth or other private place, the owner of which is unknown, belongs to the Crown ; but if he that hid it be known, or be afterwards discovered, the owner, and not the sovereign, is entitled to it.² Hiding is distinguished from abandonment, for it must, in the words of the civilians, be *vetus depositio pecuniæ* : hence, if a man scatter his treasures in the sea, or upon the surface of the earth, it belongs, by the right of occupancy, to the first finder.

The law introduced by the feudalists.

This difference in the law was probably introduced by the feudalists when the barbaric nations drove out the Roman settlers, who on their flight secreted their property in the expectation of returning ; and as this was part of the property of a nation driven out, it was looked upon in the light of property recovered by the right of postliminy, and as no particular owner could be assigned to it, the property was vested in the Crown, which was supposed to be cognizant of its existence, and to succede to the property of those who fled and abandoned it. And so important was this branch of the public revenue considered, that the punishment for appropriating it was formerly death.

§ 976.

Derelicts are capable of acquisition by finding.

The next question is as to what things are, and what things are not, capable of being found, and such are derelicts³ or things wilfully

¹ P. 6, 2, 31, § 3.

² 3 Inst. 132.

³ I. 2, 1, 4.

thrown away and abandoned with an intention to leave them for ever; such, by the law of nations, belong to the person that finds them. This seems only to be understood of such moveables as may be thrown away; yet there is no doubt¹ but that immoveable things also may be derelict: thus, when a man has quitted the possession of his ground with an intention that it should not be reckoned part of his estates, it returns to its former condition, has no possessor, and becomes again subject to the first occupant.

Moveables and immoveables.

By the Roman law, things lost by negligence or chance are not to be esteemed derelicts, for there is no intention of abandonment, and the finder in both these cases ought to save himself from the imputation of theft, by giving public notice of such finding;² and if no owner appear, a poor man may retain them as sent by Providence, but a rich man would do well to apply them to charitable purposes. However, it is agreed that the finder ought not to demand a gratuity if he have been at no charge, though he may fairly receive what may be voluntarily offered to him.

Things lost by accident are not derelicts,

Neither must we reckon things thrown away upon necessity to be derelicts, as goods thrown overboard in a tempest³ to lighten a vessel, though it be in some degree a voluntary act; for he who may seize them on the sea or when driven on shore, with the intention of retaining them, is guilty of theft, and punished by confiscation of all his goods;⁴ neither can the Exchequer in so calamitous a case pretend a title to them.⁵ A distinction is drawn as to the *animus*; thus, if a person cast things overboard to preserve them they are not abandoned, but if he knew they would perish they are so. On the other hand, if the finder save them with a view of reserving them for the rightful owner, he commits no theft; it is, however, otherwise, if he have the *animus* of appropriation.⁶

nor things abandoned of necessity.

§ 977.

The law which regulated the question of lightening a ship under pressure of necessity was the *lex Rhodia de jactu*,⁷ which requires a passing notice in this place. It was provided in the sec. 8 of that law that goods thrown overboard were not derelicts, but still belonged to the former owner, and this was the adopted maritime law of Rome.

The *lex Rhodia de jactu*.

Every one who, by damage to his own property on shipboard, shall have saved that of another, can demand an appropriate indemnification or salvage,⁸ for the recovery of which an action can only be brought against the master of the vessel, who was bound to procure for the loser salvage from those whose goods had been preserved.

Salvage.

The greater part of the provisions of this law relate to similar

¹ P. 41, 2, 3, § 6.

² P. 47, 2, 43, § 7, 8, 9.

³ I. 2, 1, § 48.

⁴ C. 6, 2.

⁵ C. 11, 5, 1.

⁶ P. 47, 2, 43, § 11.

⁷ P. 14, 2.

⁸ P. 14, 2, 1, salvage is a per-centage on the object saved or salvaged, as a reward for its preservation.

contributions and indemnifications, under certain circumstances, respecting goods thrown overboard, and damage done to the vessel.

The origin of the adoption of the Rhodian law by the Romans.

The Digest¹ gives us the authority by which the Rhodian law was adopted as the rule to govern maritime matters. Endæmon of Nicodemia having complained to the Emperor Antoninus against the customers of the Cyclades, for having seized the wreck of a ship of his on the coast of Italy, the emperor answered that he was indeed master of the world, but that maritime matters were to be judged by the law of Rhodes, in so far as it should not be contrary to any law of his own. Augustus is reported to have given a similar judgment, Εγὼ μὲν τοῦ κόσμου κύριος, ὁ δὲ νόμος τῆς θαλάσσης. Τῷ νόμῳ τῶν Ροδίων κρινέσθω τῷ ναυτικῷ, ἐν οἷς μὴ τις τῶν ἡμετέρων ἀντὶ νόμος ἐναντιοῦται. Τοῦτο δὲ καὶ ὁ θειότατος Αὔγουστος ἐκρίνειν.

Antiquity of Rhodian commerce.

The Rhodians were a maritime nation in the height of prosperity long before the Romans occupied themselves with such matters. The Romans incorporated many of the Rhodian laws into their own codes. Harmenopulos tells us that most of these laws were very ancient, and Strabo speaks of the Rhodians as possessing the empire of the sea.

Should a ship be stranded or cast away, every one must save as much of his property as he can, as in case of a fire;² thus, as has been above remarked, it is not to be inferred, that he who throws things overboard for the purpose of lightening the vessel, intends to abandon them after the fashion of a derelict, but is to be likened to a man overladen with too heavy a burden, who might put part of it down by the roadside, and return afterwards with others to fetch the remainder.³

Antoninus' edict as to wrecks,

Antoninus the Great, finding that by the imperial law the revenue of wrecks was given to the prince's treasury or *fiscus*, restrained it by an edict,⁴ and ordered the goods to remain the property of the owners, adding this humane expostulation, "*quod enim jus habet fiscus in alienâ calamitate, ut re tam luctuosa compendium sectetur.*"

and shipwrecked persons.

It is, moreover, a capital offence to destroy persons shipwrecked, or prevent their saving the ship. And to steal even a plank from a vessel in distress, or wrecked, makes the party liable to answer for the whole ship and cargo.⁵

§ 978.

Progress of the law of wrecks in England.

The common law of wrecks in England originally vested all wrecks in the king,⁶ upon the supposition that they were derelict and without an owner. Henry I. declared that this should not operate where any human being was saved from the wreck; and Henry II.⁷ by charter, extended this to animals, because by their instrumentality the true owner might be discovered—if he was so

¹ P. 14, 2, 9.

² P. 14, 2, 7.

³ P. 14, 2, 8.

⁴ C. 11, 5, 1.

⁵ Vide & 17 Ed. II.

⁶ P. 47, 9, 3.

⁷ 1 Rymer Fred. 36, 26 May 1174.

discovered within three months, otherwise they belonged to the king or lord of the franchise. Richard I.¹ confirmed these concessions, and extended it to heirs being the children, brothers, and sisters, of an owner who had perished. Henry III. extended it further, to marks on the goods.²

The first statute of Westminster³ extended the time to a year and a day, according to the customs of Normandy. At present, proof of the property takes them out of the category of a wreck.⁴ This revenue used to be granted out to lords of manors; but if the king's goods were wrecked, they might be reclaimed after the year and day,⁵ and the sheriff had power to sell those only which were perishable.

Jetsam is where the goods remain under water. *Flotsam*, where they remain floating. *Ligan*, where they are buoyed; and these may all be recovered by the owner, and are distinct from wrecks, under a grant of which they will not pass.⁶

Jetsam, flotsam, ligam.

§ 979.

Accessio is the second natural mode of acquisition, and consists in the union of the accessory thing with the principal property of the acquirer.

Acquisition by accession.

Accessio est modus acquirendi jure gentium quo vi et potestate rei nostræ aliam adquirimus. The expressions *jure naturali* and *jure gentium* are evidently used indiscriminately in some parts of the Institutes.⁷

Accessiones may be *naturales*, *artificiales*, *sive industriales et mixtæ*. To these some add *fortuitæ*, which are those which mere chance has added, such as a treasure hidden in the ground.

Accessions are natural, artificial, or mixed.

Natural accessions are such as are added to the original substance by the operation of nature, without premeditated human design.

Natural accessions.

Artificial or industrial accessions accrue through the presence of such design.

Artificial accessions.

Mixed accessions are produced by the combination of the two former conditions.

Mixed accessions.

§ 980.

Thus, in all questions of accessions, the general rule is—**ACCESSORIUM SEQUITUR PRINCIPALE.**

Rule to be observed in accessions.

It is first, therefore, necessary to consider which of the two is the principal thing, for it follows not that the accessory may not often be of more importance of the two. A slave girl would be the *principale*, her offspring the *accessorium naturale*; a field the *principale*, the *alluvium* the *accessorium naturale*; a robe the *prin-*

As to which is the principal thing.

¹ Rog. Hoved in Rich. I.

² 2 Inst. 168, Bro. Abr. tit. Wreck.

³ Bract. l. 3, c. 3, § 5.

⁴ 5 Rep. 108; see Blackstone's Com.

⁵ 3 Ed. I. c. 4; Flet. b. 1, c. 44; 2 Inst. 167, Rep. 107.

B. 1, c. 8.

⁶ Hamilton v. Davies, Trin. 11 Geo. III. B. R. 5, Burr. 2732.

⁷ I. 2, 1, compare § 18 & 19.

cipale, the embroidery thereon the *accessorium industriale*. On the contrary, a painting has been held to be the *principale*, the tablet the *accessorium artificiale*, but without good grounds; the stone in a ring, or the ring itself, may be the *principale*, according as the stone was placed to ornament the ring, or the ring to carry the seal.¹ In sowing and planting, the ground is the *principale*, the crop the *accessorium mixtum*. Napoleon affected to claim the sovereignty of Holland by a legal title, founded on the law of alluvium. "The Rhine," said the Emperor, "is mine, and the land through which it flows: Holland is an alluvial country, formed wholly by the deposit of the Rhine, as the Delta of Egypt is by that of the Nile; therefore, Holland is a natural accession to the kingdoms subject to my rule, and belongs to me." The legal conceit of the Emperor was as inconvenient to the Dutch as his *droit du plus fort*.

§ 981.

Natural accessions of land; alluvion is gradual.

The last species of natural accessions is—*insula in flumine nata, alluvio, vis fluminis, or avulsio, and alvei mutatio*.

Avulsion is sudden.

Proof of accession.

The word alluvion implies, however, a gradual increment. *Quod per alluvionem agro tuo flumen adjecit jure gentium tibi acquiritur; est autem alluvio incrementum latens per alluvionem enim id videtur adjici quod ita paulatim adjicitur ut intelligere non possis quantum quoquo momento temporis adjiciatur,*² in which it differs from *avulsio*, which is a violent separation of a piece of ground by the force of a river, and its annexation to the property of another and neighbouring estate, in which case it belongs to the previous owner; until by length of time, and without any measures taken to prevent it, they cleave together and become firmly united. This may to some extent be demonstrated by the fact of a tree fixed in a piece of ground which was torn away, spreading its roots into another part.³ It, however, appears, an equitable action will lie to recover the value from the new acquirer,⁴ because it is a maxim *neminem alterius detrimento et injuria fieri locupletiores*.⁵

§ 982.

Rights to an island rising in a river as between several claimants.

If an island rise in a public river (not in the sea, for then it belongs to the occupant), and become fixed in the middle of a river, it is in common to those who possess the land nearest to the bank on each side of the stream,⁶ according to the breadth and length of each frontage. If it lie nearer to the frontage of one estate on either side than to that of the other, that inheritance or estate has as many more feet or yards in the island as it is nearer to it. But if the whole island is nearer to one estate than to the other, that estate claims the whole. This is to be understood where the

¹ P. 34, 2, 19, § 2 & 20.

² I. 2, 1, 20.

³ I. 2, 1, 21.

⁴ P. 6, 1, 23, § 4 & 5; I. 2, 1, § 34.

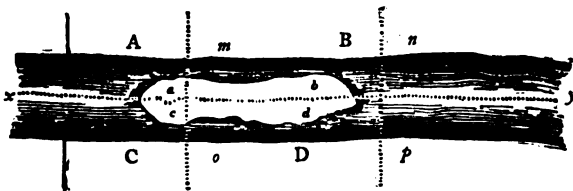
⁵ P. 50, 17, 206; P. 12, 1, 4, § 2.

⁶ I. 2, 1, 12.

lands on each side have not any certain limits and bounds ; for if they have, there can be no claim or title to such an island, but it belongs to the occupant.¹ If the river² divide its course, and make an island of land by uniting its streams afterwards, or shall overflow, a ground, that island does not belong to any occupant, or to the neighbouring estates, but to its first owner. An island rising in private rivers and lakes wholly belongs to the private persons who are owners of those lakes and rivers.

And here it will be well to exemplify these various contingencies, and the way of determining the right of property in such cases.

Of an island in the middle of a river.

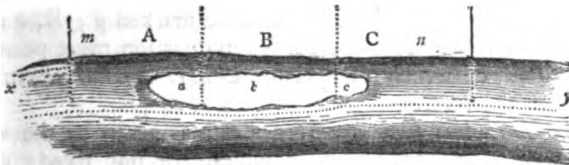


Draw the line *x, y*, lengthwise through the middle of the river. From the boundaries of the adjacent lands let fall the perpendiculars *m, n, o, p*, upon the line *x, y*.

A then gets the piece *a* ; B gets *b* ; C, *c* ; and D, *d*.

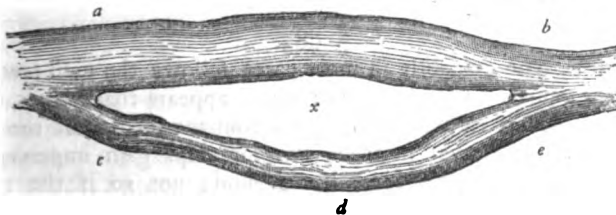
But should an island rise—not in the middle, but entirely on one side of the line *x, y*, it is wholly the property of those whose property is on that side of the river. Thus,—

Of an island rising on one side of the middle.



A taking *a* ; B, *b* ; and C, *c*.

Islands do not rise so readily in the sea as in rivers, owing to the powerful action of the waves ; if they do, they become, as *res nullius*, the property of the first occupant. Not so with respect to islands formed in rivers on the continent,—



Vis fluminis.

as when a river that flowed formerly in the bed *a, b*, divides and

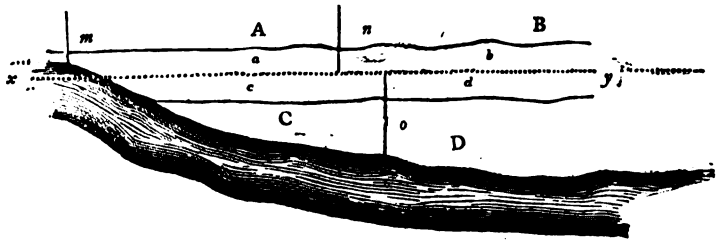
P. 43, 12, 1, § 6.

¹ I. 2, 1, 22 & 24.

flows through a second chanel, *a, c, a, e*, converting *x*, which was formerly land, into an eyot. The property in such eyot or islet is not divisible, but remains vested in its former owners, as before the change took place.

Alvei mutatio.

If a river forsake its natural chanel,¹ and gain a new one upon the land of another, the old chanel is divided between the lands in the same manner as an island rising in a public river, if those lands were not within certain bounds and limits, and the new chanel is now made as public as the river. For though the river shall afterwards return to its old course, yet in² strictness the new chanel shall also be divided among the owners of the adjacent grounds, as the old one was; but in³ equity and reason it ought to be restored to the owner. It is a question, but without reason, whether, if the course of a river which is the boundary of an empire be changed, the limits of the adjacent territories are not also changed?



Here the possessor of A gets the piece marked *a*; B, *b*; C, *c*; and D, *d*; but in this case the parties in question must possess the lands in virtue of which they claim as *agri arcifini* abetting immediately on the river.

Agri arcifini.

Ager limitatus
and *adsignatus*.

Agri arcifini quasi fines arcent are estates given by the state to the possessor, the boundaries of which are not fixed; whereas the *ager limitatus* was granted for a given number of cattle or *adsignatus* marked out by boundary stones, but it was only in the first of these cases that the owner had a right to his proportion of the deserted channel; in the second it accrued to the state.

Temporary inundation suspends, and continued inundation destroys, the right of the owner.⁴

§ 983.

English law of alluvium; if trifling, accessions belong to the proprietor; if considerable, to the Crown.

Bracton, who evidently in most cases follows the civil law, lays down the same rule for England; but it appears that islands rising in a river belong rather to him to whom the piscary of the river appertains. If a river between two lordships gain imperceptibly on the one, the owner loses his ground; not so if the river's course be changed by a violent flood, for then the imperial law

¹ I. 2, 1, § 23.

² P. 43, 12, 1, § 7.

³ P. 41, 1, 7, § 5.

⁴ I. 2, 1, 24.

applies. With respect to an island rising in the sea, the civil law gives it to the first occupant, the English law to the king. With respect to increments on the sea-shore, if insensible, the law of England gives them to the owner of the soil, on the principle of *de minimis non curat lex*; but if sudden and considerable, the *jus commune* assigns it to the Crown, for the sea is the king's, so the ground upon which it flows: for like reason, if the sea encroach upon private land, it accrues to the Crown, for the shore between high and low water mark belongs to the Crown.¹

Of the receding and encroachments of the sea.

§ 984.

The question now arises, whether the brood of cattle and slaves ought to be classed under the *fructuum perceptio*; that is, under natural or industrial accessions. The conjunction of the male may fairly be considered as a *cultura*, and the allatation, &c. as a *cura*, which would bring the young of cattle under the *fructuum perceptio*; nor has the operation of nature so much to do with the question as that element, for in the case of *alluvium* the result of the increment cannot be prevented by human means, whereas in the other case it can be so. Justinian makes a distinction, placing the brood of slaves under natural accessions, and those of cattle under *fructuum perceptio*. Thus, he says,—*In pecudum fructu etiam fœtus est sicuti lac, pilus, et lana: itaque agni hædi vituli et equuli et succuli statim naturali jure domini fructuarii sunt. Partus vero ancillæ in fructu non est; itaque ad dominum proprietatis pertinet, absurdum enim videbatur, hominem in fructu esse: quum omnes fructus rerum natura gratia hominis comparaverit*;² and in a former place,³ *item ea, quæ ex animalibus dominio tuo subjectis nata sunt, eodem jure (id est accessione) tibi adquiruntur*. It is then clear that, in treating of the Roman civil law, the *partus ancillæ* must be classed among natural, and the *fœtus animalium* under the *fructuum perceptio*.

Accession by procreation. The brood of slaves and cattle.

In Justinian's age slavery was discouraged, and we find an evident bias against it pervading all his legal works.

The principle *servus homo est* had been acknowledged for many centuries; nevertheless, in the neighbouring Greece as well as in Constantinople, a slave, even in the 14th and 15th centuries,⁴ was a chattel, and subject to the arbitrary will of the master, save the *jus vitæ et necis*; besides, although the Emperor says it is anomalous to consider a man to be a "fruit" for whom nature has created all "fruits," yet this mode of reasoning, however true in the point of view of natural law, where no distinction can be recognised between one man and another, yet in a civil law point of view it is fallacious, for the *homo* is no free agent, and is absolutely in the position of an animal, by the civil law, with the one exception above mentioned. Following, then, the rule so dis-

The former is a natural accession, the latter a *fructuum perceptio*.

¹ Vide authorities quoted by Stephens, vol. ii. b. 2, p. 83, 1st ed. 1842.

² I. 2, 1, § 37.

³ I. 2, 1, § 19.

⁴ §§ 458, 461, 462 & 463, h. op.

tinctly laid down, accession by procreation will be considered as to slaves in the present place, and as to cattle under *fructuum perceptio*.

Natural accessions.

The brood of slaves and cattle.

Of natural accessions :—

The brood of slaves is a natural accession by procreation,¹ and accrues upon the principle that the young, before it is brought forth, is part of the bowels of the mother, by whom alone it is nourished, while she on her part is fed by her owner ; hence the maxim, *meum est quod ex re meâ superest*.² It is erroneous to suppose that the issue is the joint property of the owner of the male and female in slaves, *partus sequitur ventrem*, clearly because the paternity is always more or less uncertain. Thus the Spartans traced their pedigrees through the female side ; and the principle of the Ottoman law is correct, which says the female is my ground on which you sow ; hence their law claims the allegiance of the issue of all their female subjects, without reference to the nationality of the father. House-born slaves were by the Romans termed *verna* ; by the Greeks *δικόρυβες*, and were more highly prized than others.

§ 985.

Artificial or industrial accessions :—

Specificatio, pictura, confusio, adjunctio, commixtio, inædificatio, scriptura.

The general principles by which these are governed—what is accessory, and what principal.

Artificial or industrial accessions are such as arise by the industry of man, and consist in *specificatio*, *pictura*, *confusio*, *adjunctio*, *commixtio*, *inædificatio*, *scriptura*.

With respect to such accessions, the property of the owner is either in the *principale* or in the *accessorium*. If the owner of the principal thing cause the junction, the whole is his ; but here the property may be *revocable* or *irrevocable*, in which latter case, under certain circumstances, an indemnification may be payable to the owner of the accessory thing. Irrevocable are such things as cannot be severed without damage to the whole, hence called extinct, *extinctæ res vindicari non possunt* ; but if otherwise, the party has an *actio ad exhibendum*, to cause this property to be recovered and delivered to him. This can be done in all cases where the severance can be effected. Thus, if one embroider gold thread upon my robe, the thread belongs to me as an *accessorium* ; not so before the junction was effected. The case is otherwise with a diamond fixed in a gold ring, because it can be severed without damage to either the ring or the stone, whichever may be considered the *principale*. With respect to accessions, it is asserted by many writers that the rules of the Roman law in several of these cases are not founded on reason or the natural equity of the law of nations, but are merely positive and civil for the benefit of trade and commerce ; indeed, there is scarcely any point on which the lawyers have held opinions so varying, or one more open to mistaken inferences : for natural equity seems to suggest, in some cases of accession, that the thing should be common property in proportion to that which each may have severally con-

¹ C. 3, 32, 7 ; P. 6, 1, 5, § 2.

² P. 6, 1, 49, § 1.

tributed ; and that, in the case of acquiring by profits, allowance ought to be made to the person in possession, at least for his expenses and labour : fixed rules have, however, been laid down, guided by certain maxims, in order to attain some degree of uniformity, which cannot therefore be questioned here, but which must be set forth and elucidated as they are found.

The most important point is the *bona* or *mala fides* of the appropriator ; and if the latter be proved, he is exposed to an *actio furti* or *condictio furtiva* : if the former, three contingencies may arise,—either he has paid the full value, or less than the full value, or nothing ; in the first case he is bound to pay nothing more, in the second case the deficit, in the last the value of the thing employed.

Bona and mala fides.

The second case is, when *the owner of the accessorial thing causes the conjunction of both*, which may be most conveniently elucidated by an example. A party buys a stolen robe, and has it embroidered in gold, or has lace put thereon. If the severance can be made without damage, as in the latter case, if not in his possession, he brings his *actio ad exhibendum*, and vindicates it : but if, as in the case of the embroidery, the severance cannot be made without damage, the question of *bona* and *mala fides* arises ; if the latter, he loses the property in the accessorial thing ; if the former, he is either in actual possession of the combined things or not ; if the former, he can exercise the right of retention or lien till the former owner shall have repaid the price of the material and labour, but if he have lost his lien, he has no remedy by Roman law—in practice it would, however, not be refused, on the principle “that no one ought to enrich himself at another’s expense.”

§ 986.

Specification is, when from the substance or matter of another person a new kind of body or species is produced. By such an accession, he that made the new species is the owner of the whole, if it *cannot* be easily reduced to its first state and condition, as when wine is pressed from another’s grapes, or a ship is built of another’s timber, the wine or the ship cannot be claimed. But if the matter *may* be recast into its first condition, as a vessel or statue made of another man’s silver or brass,¹ the property belongs only to the owner of the substance whereof it was made. In the first case, where the matter *cannot* be reduced to its first state, a just^e payment must be made, *e.g.*, for the grapes and timber ; and in the other, a reasonable allowance for the workmanship. But this determination only takes place in favor of the workman, where the work was designed for his own use, and where he erroneously and by mistake thought the material was his own. For if it was made in the name of any³ other, it belongs to such person for whose

Specification consists in the production of a new species. Where the workmanship and material are in different owners, and cannot be reduced to its original condition.

Indemnity when due to workmen.

¹ P. 41, 1, 7, § 7.

² P. 6, 1, 2, 3, 4.

³ P. 41, 1, 25 & 27, § 1.

use it was made upon the same terms ; and if it be known that the grapes are another's, and yet a party proceeds to make his wine or ship thereof, he¹ loses his labor, and the whole accrues to the use of the owner, and an action may be maintained against him. The same distinctions are to be observed where the matter is² partly the workman's and partly a stranger's, when the thing made cannot be reduced to its former state,³ but if it can, each shall have his share, or both may possess parts proportionably to their respective contributions.

When specification gives a right of ownership.

In this case the difficulty is to distinguish as to when specification gives a right of ownership, and when not—which the four following cases are meant to exemplify :—

I make wine from mine own grapes ; here the wine is mine, *not* by the specification, but by right of property in the original matter.

A goldsmith makes a ring for me at my desire, out of my gold, which is nearly the same case as the former.

When the owner gives the matter, and another the labour, on the understanding that the thing produced shall be common : Neither does this give any right, for it is a question of contract and tradition thereupon.

But if I make a table from stolen wood, here the question of ownership arises.

Opposite views of the Sabinians and Proculians.

The old lawyers differed much on this point. The Sabinians held the thing thus produced to belong to the owner of the material, not to the specificant, as the maker was called, considering specification as conferring no possessory title.

The Proculians, on the other hand, assigned the new modelled substance to the specificant, thus annexing a possessory title to specification. Justinian settled this dispute by a series of decisions, taken for the most part from Ulpian, Paulus, and Gaius. In the cases where a new form produced from mine and another's material, or wholly from another's materials and not reconvertible into its original form, specification is a *modus adquirendi* ; but when reconvertible, Justinian calls the matter stronger than the form, or the form than the matter if not so, which it must be admitted is a most unsatisfactory mode of reasoning.

Bona fides as applied to specification.

Some remarks, however, arise on this question. 1st. The necessity of *bona fides* to the obtaining of ownership : many take this view,⁴ although it cannot be ascertained from the laws we have, as Bachov. and Voet. sufficiently prove.⁵ 2nd. Whether these decisions of Justinian obtain at present where the Roman

¹ P. 10, 4, 12, § 3.

² P. 6, 1, 5.

³ P. 41, 1, 27, § 2.

⁴ Vin. ad I. 2, 1, § 25.

⁵ Bachov. ad I. 2, 1, § 25 ; Voet. ad Pand. de Acqui. Rer. Dom. n. 21 ; vide et Harmenopulus, 2, 1, 22.

aw is used? Stryk¹ urges good reasons in favor thereof, while others substitute other distinctions.

§ 987.

Pictura, painting, appears to involve a pure question of value. Paulus was of opinion that the picture followed the tablet, but Gaius thought otherwise, as considering by fiction the picture probably as the principal thing on account of its value,² to which the emperor adheres, giving as a reason the dignity of the art of painting.³

Pictura involves a question of value.

If, then, the painting be in the possession of the owner of the tablet, and the artist demand it, but refuse to refund the value of the tablet, he can be met by an *exceptio doli mali*. But if he who painted the picture, says Gaius, be in possession thereof, the proprietor of the tablet has an *actio utilis* against him; and if the owner of the tablet will not pay the value of the painting, he can be met by the *exceptio doli mali*—certainly so, if he who painted the picture were *bonæ fidei* possessor.⁴

The question of lien,

and *bona fides*.

If the artist or another purloined the tablet, the owner has naturally an *actio furti*.

This applies exclusively to moveable tablets; if fixed to, or drawn upon a wall, the case is different.

§ 988.

Confusio is the mixture of things that can be poured together in a fluid state, be they of the same or of different natures—as wine with wine, wine with honey, or gold and silver, which forms *electrum*.

Confusio is the mixture of fluids.

If such confusion be made by joint consent of both owners, the substance so produced is in common, but the ground of the commonalty lies in the agreement, not in the confusion. The same rule applies whether the confusion have been intentional on the part of one owner only, or accidental;⁵ except, indeed, where a separation or severance may take place without prejudice,⁶ as in a mass of gold and lead; or if by the consent of one only, the things be confounded, and a new species produced, as in specification, for then he who made the mixture is proprietor of the whole. Confusion by accident is to be considered merely as a method of accession or acquisition of property, in which the award of proportions may afterwards be made rateably, according to the respective values of the matters before confusion.

The right in confused liquids.

When, without the consent of both parties, fluid or melted masses are so mixed that no severance is possible, and the confusion be made by accident, the adjudication of this common mass will be quantity for quantity, or measure for measure; but if it be made

Made without the consent of the parties.

¹In *Us. Mod. tit. de A. R. D.* (xli. 1), § 24; *Cocceii Jur. Contr. tit. de A. R. D.* 21; *Walch Controv. p. 109.*

²P. 6, 1, 23, § 3.

³I. 2, 1, § 34.

⁴P. 41, 1, 9, § 2.

⁵I. 2, 1, § 27.

⁶P. 41, 1, 12, § 1.

is a kind of
specification.

without consent of the other party, and if the specificant have a good title, viz., if he buy wine which has been stolen, and mix it with his own, the strange property is acquired by the confusion;¹ but if he have not, then the case is one of stolen wine mixed with other wine, or of two liquids of different natures being mixed, as wine and spirits: in the first case the mixture is common, the confusion is a *modus acquirendi*, and the division takes place as before; but in the second case they are not so, because a kind of specification has simultaneously taken place, and confusion in this case too is a *modus acquirendi*. The indemnity to the other party is as follows:—

If the specificant have given the full value, he is bound to pay no more; if less, then the difference between the full value and what he had paid already; but if nothing, in that case the full value of the accessory object.

Summary of the
modes of con-
fusion.

The species of confusion may be thus summed up,—

Confusion by mutual consent.

Confusion by consent of one party only.

Confusion by accident, or consent of neither party.

Confusion which produces a new species, and which is therefore inseverable.

Confusion, the confounded ingredients of which are severable.

§ 989.

Ad or Conjunction.

Question of
respective value
of principal and
accessory.

In *con* or *adjunctio*, it must be considered which is properly the *principal* thing, and which the *accessory*. Conjectures may be made from the intention of the agent. And though the² accessory should be the most value, yet it does not lose the denomination of an accessory; as purple is accessory in respect of a coarse garment, *purpura vesti nostræ intextu aut attexta*; a jewel to a gold ring, though gold may be accessory to the jewel—as when that is made for the conveniency of its carriage; and the garment may be accessory to the purple, when that is made for the sake of it. We are apt to call a thing by the name of a principal with respect to another thing when it is not, but perhaps they are both principals, and usually go together, as a last will and a legacy; therefore, if it cannot be determined which is the principal and which is the accessory, such names ought not to be applied. Where one thing is added for the sake of the other there is a foundation for it,³ *nec plus in accessione esse potest quam in principali*

¹ P. 46, 3, 78; Alciat ad L. 15; D. de Reb. Crid. Opp. Basil, 1582, tom. 1, p. 333, n. 4; Fachen Controv. lib. 11, cap. 51. It must, however, be also observed, in this case, whether the specificant operated upon the property of the other in good or bad faith. In the first case he owes a full indemnity to the owner. If a person dishonestly convert the matter of another into

a new shape, the law allows the owner of the material the choice of demanding the value of the material, claiming the produce thereof, or its value, should it not be forthcoming. P. 10, 4, 12, § 3; P. 13, 1, 13; P. 47, 2, 52, § 14; H. Donell. Cam. Jur. Civ. lib. 4, cap. 22.

² P. 34, 2, 19, § 13.

³ P. 50, 17, 178; I. 3, 21, § 5.

re; and then only can the accessory follow the principal, and the owner of that which is accessory must yield up the possession to the proprietor of the principal, for *cum principalis causa non consistat, plerumque ne ea quidem quæ sequuntur locum habent*.¹ This rule holds, though the addition of another person's goods to mine own was² knowingly and dishonestly contrived, for here only regard is had to the things joined, and not to the person, as before, in specification. The property of the things added is lost so long as the adjunction continues, yet an action lies that the things added may by sentence be severed and restored at least for the price and value thereof. If any one shall by mistake join something of his own to that of another of greater value as the principal thing, supposing it to belong to himself—if he have possession he may keep the whole till he shall have paid the value of the thing added;³ but if this were done wittingly and *mala fide*, it may be interpreted as a gift to the proprietor of the principal.

In the case of a stone set in a ring; this adjunction is called *inclusio*; on the addition by forging, soldering, or otherwise, of one piece of metal to another, *adferruminatio*; by plugging, *adplumbatura*; by weaving, or sewing; *intextura*, by embroidering; *attextura*, by trimming.

The property in things adjoined lost during adjunction and severance.

Lien in cases of bonæ fidei adjunction. In cases of malæ fidei.

Inclusio. Adferruminatio. Adplumbatura. Intextura. Attextura.

§ 990.

Commixtio, or a mixture of solids, cannot be in common, unless by *mutual consent*. For if by *accident*, or by the act of one party only, two bushels of wheat belonging to two different persons be mixed, the whole heap ought not to be in common, for each grain remains the same, although it cannot easily be distinguished by its owner on an action brought. It lies, therefore, in the discretion of the judge to divide the whole heap, making a greater allowance to one in money or corn, if his grain was better or finer than that of the other. Here the argument against community laid down by Justinian is, *quia singula corpora in suâ substantiâ durant*,⁴ and the emperor gives the instance of corn or two flocks being intermixed. Höpfner, however, puts the case of money or firewood being mixed by accident, in which case each takes by *number* or *measure* so many *pieces* or *chords* of wood; and this, he contends, gives a title by commixtion, which Justinian denies, ruling that the things are common. Faber⁵ holds a different opinion, but Brunnemann⁶ agrees with Höpfner.

Commixtio, or mixture of solids, differs from confusio, in that the mass cannot be common.

The action to be brought is not *communi dividendo*, for the mass is not in common, but *rei vindicatio*; nor is it necessary that the grains should be distinguishable, but that it be ascertained how much belongs to each in the heap.

Action for severance.

¹ P. 50, 17, 178.

² I. 2, 1, 26.

³ P. 6, 1, 23, § 4.

⁴ I. 2, 1, § 28.

⁵ Ad Colleg. Argent. tit. de Acquir. Rer. Dom. n. 34.

⁶ Ex 6, ad h. § n. c.

Grotius's view
on this subject.

It would not be well to quit this subject without alluding to the view of Grotius, whose opinion is always entitled to its due weight, on account of the admirable reasoning and logic it contains; and who argues, first alluding to the dispute between the Sabinians and Proculeians, that

That a thing
according to
nature becomes
common, as
well by its speci-
fication of form
when the
matter is
another's, as by
confusion or
mixture,

"When any one had formed a thing out of another's materials, the Sabinians gave the property to him whose the materials were, but Proculus to him who formed or put it into such a shape, because he gave it an existence which it did not before possess. Ultimately, an opinion between both was adopted, viz., that if the matter could be reduced to its first or former shape, it should then be his who owned it before; if that could not be done, then it should be his who gave it its last form. But Connanus does not approve of this, and would consider whether the work or the stuff be worth most, and thus estimate, so that which was the greater was to prevail over the lesser value—an argument deduced from the opinion of the Roman lawyers respecting accession.

"But if we consider the natural truth, as by a mixture of several materials, there arises a common title to the thing so mixed in proportion to whatever each may have contributed,—of which also the Roman lawyers approved, because the right to such a mixture could not otherwise fairly be decided; so when a thing is composed of a matter and a form, if the matter belongs to one and the form to another, then must it naturally follow that the whole belongs to each contributor in proportion to the value of each part; for the form or shape is a part of the substance, but not the whole substance, which Ulpian perceived when he said that the substance was almost lost by the alteration of its form.

even though by
unskilfulness or
design the
matter be
spoiled.

"But though it be not unjustly decreed that he who undertakes another man's work and spoils his materials, either purposely or for want of that skill to which he pretended, shall thereby lose his labor, and forfeit all that to which he would be otherwise entitled, yet, since this has its penalty, it cannot be founded on any natural right; for though it be natural that every offender should be punished, yet nature does not determine that punishment, nor does she of herself take away any one's property for his offence.

That it is not
natural that a
thing of lesser
value should, on
the account of
other's greater
worth, go along
with it.
Other errors of
the Roman
lawyers noticed.

"And to say that the thing of a lesser value must be included in that which is of greater worth, upon which Connanus founds his arguments, though it be natural in respect of matter of fact, yet it is not so of right. Wherefore, he who possesses but the twentieth part of an estate has as much right in that part as he who has the other nineteen; and, therefore, what the Roman law has in some particular cases decreed, or in some others may decree, concerning an accession on the account of superior value, is not admissible according to the law of nations, but only by the civil law, for the more easy transaction of business, yet it is not repugnant to nature, because the law has power to create a right. But there

are scarce any one question relating to right on which both the opinions and the mistakes of lawyers are so varied. For who can admit that if brass and gold were mixed together they might not be separated, as Ulpian writes; or if metals were soldered together they must needs be confounded, as Paulus asserts; again, there is one rule for writing, another for a picture, that the latter should prevail over the canvass, but the former should attach upon the paper."

§ 991.

Inædificatio, building is another species of industrial accession. Building materials, of whatsoever description, are generally included in the term *tignum*. As a general rule, the building is acquired by the proprietor of the soil, but two different cases may arise. The building may be built on *my property* with the materials of *another*, or on *another's property* with *my* materials.

In the first case the builder with another's materials on his own ground is the proprietor of the building, because the building follows the soil, but the owner of the materials has cause of action for double the value thereof (*actio in duplum*), for in no case can he pull down the building so as to recover the materials, —because, first, the act would be a trespass, —and because, secondly, it would furnish means of unfairly annoying parties, and disturb the regularity of buildings in general, neither can he bring an action of *vindicatio*;¹ these rules even extend to the poles used to support vines, whereupon Ulpian says, quoting the law of the Twelve Tables, —*Lex duodecim tabularum neque solvere permittit tignum furtivum ædibus vel vineæ junctum, neque vindicare quod providenter lex effecit, ne vel ædificia sub hoc pretextu diruantur vel vinearum cultura turbetur; sed in eum, qui convictus est junxisse, in duplum dat actionem*, whereby the builder is indemnified for his work and labor, reckoned equal to the value of the materials; should the building, however, fall, and no indemnification have been made by an *actio in duplum*, the *actio vindicationis* or *ad exhibendum* will lie, for the materials are then severed and reduced to their original condition, independently of the soil.²

Many cases may arise—of which the following are the principal, and will serve as examples.

Some jurists deny, although the law has decided, that an *actio in duplum* will lie for the materials, when the builder acts with good faith.³

If the owner demand it, the builder is at liberty to take out the materials, and return them *in natura*.⁴

If the building fall or be pulled down, and the owner has

Inædificatio.

Tignum a general term.

Building with materials not his own.

Buildings cannot be pulled down for the purposes of severance.

Indemnification due to the builder.

Action for specific recovery lies when the building is razed.

Cases which may arise in *inædificatio*, bona and mala fides.

¹ P. 47, 3, 1, pr.

² P. 41, 1, 60.

⁴ Id. c. 2, § 10, et seq.; Goer. Balck.

³ Westenberg de Causis Obligat. Diss. 6, c. 2 & 3.

Elect. j. c. lib. 2, c. 14.

received double value, he can still vindicate his materials, on proof that the builder acted in bad faith, but not otherwise.¹

If a party build on another's ground with his own materials : ²

The proprietor loses his materials under the presumption that he gave them to the owner of the soil, because *qui sciens in alieno solo ædificat, donasse videtur materiam quod eam nullo jure cogente fit, id donari videatur*,³ and this even though the transaction were *bonâ fide*—that is, the builder believed the ground to be his ; if the builder, however, be in actual possession, he may hold over till indemnified for his expenses,—but if he be not so in possession, he has no action, and his expenses are lost.⁴ In cases of *mala fides*, however, the builder can neither demand the value of materials nor of labor, nor of the former alone, even though the house have been pulled down.

If the building be pulled down, some think it just that the materials also should be restored. It is to be observed, however, that the building is one thing and the material of the building is another, so that both may have owners, but in a different respect : what has been referred to building on another's soil, applies equally to buildings upon the wall of another.⁵

Expensæ neces-
saria, utilia,
voluntaria,
volupturia.
Necessaria.

Under this head may be considered the nature of expenses and moneys laid out on another's house,⁶ divisible into *necessaria*, *utiles*, and *voluntariæ* or *voluptuariæ*.

Necessary expenses for upholding a house ought to be allowed by the proprietor to the person in *bonæ* or *mala fidei* possession, because the necessity of the case excludes at once the presumption of blame or gift,⁷ as does also the obligation to uphold.⁸

Utilia.

Useful, or *convenient*, are such expenses as have been incurred for the conveniency of the possessor, and cannot strictly be demanded, but the person lawfully in possession may take away what he has erected, if it can be done without prejudice to the proprietor,⁹ unless the proprietor make an allowance for the profit which the possessor can otherwise make thereof. The *mala fidei* possessor cannot deduct the money laid out therein from the mean profits, but can only remove the thing itself.

Voluntaria, sive
voluptuaria.

Voluntary, or voluptuary, expenses are such as are made at the option of the party for his own luxury and enjoyment, on account of which no claim can of course be made.

§ 992.

Scriptura, or writing, although in letters of gold, and the sub-

¹ Westenberg l. c., c. 2, § 2, 3, 4, 5;
6; Huber, h. t. § 39.

² I. 2, 1, § 30.

³ P. 50, 17, 82.

⁴ Vinn. in Quæst. Sel. lib. 1, c. 21;
Faber de Error. Pragm. tom. 2; Dec. 26;
Error. 8 & 9, p. m. 40.

⁵ P. 41, 1, 22.

⁶ P. 25, 1.

⁷ P. 34, 4, 18; C. 3, 32, 5; P. 6, 1,

15, § 1.

⁸ P. 25, 1, 3, § 1.

⁹ P. 25, 7, 8 & 9.

ject a poem, history, or oration, on paper or parchment, follows the material, upon the same principle that buildings follow the soil whereon built; if, however, the writer be *bonæ fidei possessor*, the expense of the writing must be reimbursed to him and he can defend himself against the owner thereof by a plea of *dolus malus*.¹

Scriptura follows the rule of edification.

The principle whereon this proceeds makes Vinnius very angry, who thanks God the modern law has altered this rule, and puts a case,—I may write on the parchment or paper of another that which, if communicated, would be very prejudicial to me, and why should I be deprived of my accounts, inventories, or otherwise, if willing to pay the value of the material whereon it is written.

Vinnius's indignation.

In England, if a bill of exchange be stolen, the indictment may be laid for a piece of paper of a nominal value, the bill as paper being *primâ facie* the property of the bearer.

§ 993.

Sowing and planting, *Satio* and *Implantatio*, belong to mixed accessions, because it requires industry to bring forth the powers of nature; the maxim, therefore, which rules these accessions is, that they are an *accessorium* of the ground, which is the *principale*—hence they belong to the owner thereof: nevertheless, several cases may arise.

Mixed accession: satio and implantatio.

If one man by mistake sow in another's ground, the owner of the land acquires the crop; even so, although one party steal the seed to sow his own land with, he will have a right to the produce. The questions, however, which arise, are of indemnity in the first case for seed and tillage, and in the second for the value of the seed improperly appropriated by the owner of the soil, which follows the rule above enunciated in the case of confusion.²

Sowing in another's ground or with another's seed.

If plants belonging to one party be transferred to the land of another, they accrue to this latter so soon as the roots shall have struck, until which time they are capable of vindication; as in the following case,—one party steals trees, and* sells them to another, who plants them in his garden, where they take root, a fact which is held to be established by their budding, by which therefore the trees become irrevocably acquired by the owner of the soil. The same will be the case if a man plant his trees in error in another's ground; no *rei vindicatio* will lie for their recovery after they have taken root, but simply a *utilis rei vindicatio*³ for their value.

By transplanting, the right accrues with the striking.

Rei vindicatio.

If trees stand upon the boundary of two estates, four several cases may arise.

Trees on or near a boundary.

The tree stands exactly *in confinio*, in which case it is common;⁴

¹ P. 6, 1, 23, § 3; P. 41, 1, 9, § 1.

² § 987, h. op.

³ P. 6, 1, 5, § 3, Ulpian; Noorda Interpret. p. 138, ed. 2nd.

⁴ I. 2, 1, § 31; P. 41, 1, 7, § 13; P. 10, 3, 19; P. 17, 2, 83.

Confinium,
what.

and here it must be premised that *confinium* can have two meanings,—firstly, the line which divides two properties; secondly, the space between them, which was by Roman custom usually from three to six feet broad, and was by a law of the Twelve Tables incapable of usucapion.

A tree stands near on the boundary—in this case it belongs to him out of whose ground it grows, *in cuius fundo originem habet*.¹ Weber disagrees with Höpfner's view of this expression, that a tree is to be assigned according to its roots, because it would be impossible to ascertain how many roots were on one or the other estate; moreover, the examination would kill the plant.

Erroneous view
taken of Gaius's
expression as to
the property in
trees on a
boundary.

In the Institutes we find,—*adeo autem ex eo tempore, quo radices eget planta, proprietates ejus commutatur, ut si vicini arbor, ita terram Titii presserit, ut in ejus fundum radices egerit, Titii effici arborem dicamus; ratio enim non permittit ut alterius arbor esse intelligatur quam cuius in fundum radices egisset*.² Gaius had before written, *quodsi vicini arborem ita terra presserim ut in meum fundum radices egerit meam effici arborem rationem enim non permittere ut alterius arbor intelligatur quam cuius in fundo radices egisset*.³ The framers of the Institutes, it is supposed, borrowed this passage from Gaius without understanding it, and altered it to their purpose, the meaning of *ita terra presserim* in Gaius being the drawing a branch over to his own side, and laying it so as to produce roots in his own ground—a supposition which certainly clears up the difficulty.

When over-
hanging trees
must be lopped.

If a tree standing on a boundary line injure the building *prædium urbanum*, of another, this latter can require of his neighbour that he cut it down;⁴ but if it injure the *prædium rusticum* of another, that he trim the branches fifteen feet up from the ground,⁵ but no higher, and the neighbour must not only bear with this mitigated inconvenience, but permit the gathering⁶ of such fruits as may fall therefrom on his ground, which is enforceable by an *interdictum de glande legenda*.

German prac-
tice.

The German practice is more liberal,—it cannot be required that a tree be cut down, but merely trimmed so far as it may be injurious, which is not limited to fifteen feet—but if not trimmed, the neighbour has a right to all the fruit which falls therefrom on to his land.

§ 994.

Fructuum per-
ceptio.

Fructuum perceptio has been asserted by commentators, as has already been seen, to be a separate mode of acquisition, the Insti-

¹ P. 47, 7, 6, § 2.

² I. 2, 1, § 31.

³ Arnaud. Var. Conject. lib. 1, c. 1 & 2; sed vide Schröder in Obs. j. c. lib. 1, c. 5, contra.

⁴ P. 43, 27, 1, § 7, 8, 9.

⁵ Hugo, Ges. de R. R. § 89, reverses the order, on the authority of the Basilik, L. 60,

t. 16, n. 13, asserting that the fifteen feet begin from the top, and that the obligation is to lop the tree, *contra* Dirksen et Thibaut, Civil Abh. p. 1; R. 10, 1, 13; Paul. R. S. v. 6, § 13; Schulding in Not. p. 462.

⁶ P. 43, 28, 1; Thib. Int. de Gland. Leg. Civil Abh. n. 1.

tutes make no especial divisions; it is therefore permissible, for the sake of perspicuity, to divide the *modi acquirendi* in such a manner as will render the subject the most clear.

In the case of fruits gathered and consumed, it is important, first, to consider what comes under that denomination, and to elucidate the signification of the word *causa*.

The word *causa* is divided into *interna* and *externa*.

Causa interna comprehends rights belonging to a thing, as right of chase, jurisdiction, &c.

Causa interna is a right; *causa externa*, an accessio.

Physical properties, as the fruitfulness or unfruitfulness, good or bad aspect of an estate, the good or ruinous state of a house, the youth or agedness of an animal, &c.

Causa externa is either *fructus* or *accessio stricte dicta*.

The first, are such as have their existence in the thing, as grass on a meadow.

The latter consists in the furniture of a house, and things which belong thereto, but have not thence their origin.

Fructus is either *ordinarius* or *extraordinarius*.

Fructus extraordinarii ordinarii.

Ordinarii, for which we acquire anything, as a meadow for the grass, arable land for the corn, or an orchard for its produce; hence grass, wheat, or fruit, are ordinary fruits.

Extraordinarii, which are *civiles et naturales*; this latter being rather *naturales stricte*, or *industriales*.

Extraordinarii civiles et naturales.

Si occasione rei percipiuntur sunt civiles, as interest of money, rent, and the like.

Si fructus ex re nascuntur sunt naturales, as wheat, grass, fruit, &c.

If produced *without* culture, they are *stricte naturales*, as grass, acorns, wild fruits, and the like.

If produced *by* culture, *industriales*, as wheat, garden nuts, and fruit.

Industriales.

These *fructus* may be either *pendentes*, *percepti*, *separati*, or *percipiendi*.

Fructus pendentes, percepti, separati, or percipiendi.

Hanging, are those still in connexion with the plant whereon they grow.

Gathered, those severed by the owner, to be by him made use of.

Percepti.

Severed, such as fall by force of the weather from ripeness or by robbers.¹

Separati.

Gatherable, are such as could have been gathered had the owner desired to do so.

Percipiendi.

Having premised the above, it will be easy to obtain an idea of the *fructuum perceptio*.

Whoso possesses a thing in right of ownership, *dominium*, as usufructuary, hirer, antichretic creditor, or *bonæ fidei possessor*, has a right to the fruits produced.

¹ P. 22, 1, 25, § 1; P. 41, 1, 48, pr.

The *dominus* possesses *jure soli*, according to Julian,¹ or *jure accessionis*, before perception.

The *usufructuarius*, upon perception or gathering, *si ipse eos perceperit*,² this being a corporeal right to a foreign matter.

The *mandatarius*, as farmer, gathers the fruits.

The *creditor antichreticus*, is he to whom the fruits of the security are allowed instead of interest.³

These two last, like the usufructuary, obtain a right in the fruits on gathering them.

Of bona fides.

The *bonæ fidei possessor*, has a certain right to the fruit he possesses *bonâ fide* and *justo titulo*, who is as follows :—

A buys an estate from him who is held to be the next heir of deceased, but afterwards a nearer heir appears and ousts A. A possesses *bonâ fide*, and knows not otherwise than that it is his property.

Bona fides is uninterrupted, because A gathers the fruit every year, and consequently must be *bonâ fide*.

A has a just title ; that is, his title would have been good if the seller had had the power of alienation.

Limitation of time and mean profits.

The *bonæ fidei possessor* has then no lien upon *fructus pendentes*, because the principal thing not being his, he has no *jus accessionis* ; but he is answerable to the *dominus*, whenever he may appear for the profits of the three preceding years after which the limitation has run, if in the mean time no action has been brought.⁴ But even in some cases fruits within three years are acquired, as in the following cases :—viz. if they be *deperditi*, lost by chance or the fault of the possessor ; if they be alienated by sale or gift ; if they be consumed, eaten up, or used as fodder ; and this, be they natural or industrial.⁵

Neither is he even answerable for *fructus percipiendi* arising out of the period before commencement of suit, but only for those which he shall have lost by his own fault, *culpâ suâ*, during suit. And this is the most general and best opinion.

Diversity of opinion among commentators.

Some commentators, however, assert, on the authority of certain passages, that the *bonæ fidei possessor* must deliver up such fruits as have not been barred by limitation ; others, on the other hand, that he retains all gathered fruits, without exception, though not consumed, but certainly the industrial produce.

Fruges consumptæ.

The case of non-responsibility for consumed fruits has been questioned ; also some contending that if the possessor in good faith be richer, or have spent less of his own money, he must give indemnity.

Bachov. and Huber doubt even as to natural fruits, saying, that though indeed they require no *cultura*, yet they require *cura*.⁶

¹ P. 22, 1, § 25 pr.

² I. 2, 1, § 36 ; P. 7, 4, 13, in fin.

³ Höpfner, § 330 ; Vinn. ad. I. 2, 1, § 36 ; P. 19, 2, 60, § 5.

⁴ P. 41, 3, 4, § 19.

⁵ I. 2, 1, § 35 ; I. 4, 17, § 2 ; P. 5, 3, 22 & 25, § 11 ; P. 6, 1, 62, § 1 ; P. 10, 1, 4, § 2 ; P. 22, 1, 25, § 1 & 45 ; P. 41, 1, 48 ; C. 3, 31, 1 ; C. 3, 32, 17 & 22 ; C. 7, 51, 1.

⁶ I. 2, 1, § 36.

The *malæ fidei possessor* has no right to any fruits whatever, and must surrender such as he have, and refund the mean profits of such as he shall have alienated. He is deprived of the *exceptio doli mali*, being himself *in dolo*; as, according to the maxim of the English law, he cannot take advantage of his own wrong.

A *malæ fidei possessor* is deprived of the *exceptio doli mali*.

§ 995.

In England, emblements were formerly part of the freehold till gathered,¹ a statute allows landlords to distrain corn, grass, hops, and other produce of a similar nature growing on demised premises.² Fruits on the tree and natural grasses³ are not emblements, though grass, by a positive enactment, is subject to a distress for rent.

Emblements in England

Emblements devolve on the executor, because intended subsequently to form part of his personal estate, and do not descend to the heir; but a *devise* of land carries the emblements with the principal.⁴

belong to the executor.

Trees felled or blown down are personal property, but pass with the land if standing.

The emblements belong to the tenant, if the estate determine at a period the tenant could not foresee, as on lives; if on hiring, they belong to the landlord, if the hiring be determined by the tenant's act; to the tenant, if determined by that of the landlord.

Right of the tenant.

§ 996.

It has been seen that there were anciently two species of things different in their nature—the one termed *mancipi*, the other *nec mancipi*; the legal estate in the former was only to be⁵ secured by *mancipatio in jure cessio* and *usucapio*, whereby they passed into *dominium* or quiritian ownership, but if this species of things was transferred by tradition, the acquirer gained a mere equitable title without any warranty, and they were said to be *in bonis*, merely because the legal estate did not pass until it had been acquired by *usucapio*. *Res nec mancipi* could not be transferred by mancipation nor by *in jure cessio*, but merely by *tradition* or bare delivery; and after the time prescribed by law *usucapio* stepped in and confirmed the title, without, however, conferring the quiritian ownership, whereof these things by their very nature were incapable.

The legal estate was acquired by mancipation, but the equitable estate was tradition,

It is not clear at what period the old form of mancipation fell into desuetude—it may be that the old distinction of *res mancipi* and *nec mancipi* survived it; it is, however, probable that both had become a dead letter in Justinian's time, as he formally abrogates the difference, and with it abolishes *mancipatio*, and consequently the distinction between quiritian and bonitarian ownership. Tradition stepped into the place of mancipation, and was all sufficient in the acquisition of property under the conditions attached to it. Mancipation being a *legal* not a *natural* mode of transfer, does not belong in this place.

which superseded it.

¹ 11 Geo. II. 19.

² Clark *v.* Gaskarth, 8; Faunt. 431; Clark *v.* Calvert, ib. 742.

³ Toll. Ex. 193.

⁴ Co. Litt. Harg. 47, b. n. 1.

⁵ § 931, h. op.

§ 997.

Tradition a natural mode of acquisition.

Traditio is the last natural mode whereby things may be acquired,—for nothing, says the emperor,¹ is more consistent with natural equity than that the will of the donor should be effective in transferring any object to another.

The civilians think the contract sufficient without delivery.

Some of the most distinguished civilians have been of opinion that nothing but the contract was necessary to transfer a real right from one to another person,² but by the Roman law the contract operates a mere *jus in personam*, and delivery is necessary to complete the transaction: thus it may be said that by contracts things are due, by delivery the property is altered; delivery in this case appears to belong to the civil rather than to the natural law—delivery is, however, at least the best evidence of the contract. Justinian probably, in placing tradition among the natural modes of acquisition, argued that as occupation was a natural mode of acquisition, tradition was so too—that is, the possessor abandoned it, whereupon it became fictitiously *res nullius*, and was again capable of occupation,—that the tradition was the evidence of this abandonment; but it is difficult to make it at best more than this, and the emperor would have certainly done better to have placed tradition among the civil modes of acquisition.

Delivery belongs properly to the civil law.

Double signification of *traditio*.

Traditio has a double meaning,—it is generally a corporeal act whereby the possessor transfers his possession to another, and in this sense a *depositor* may be said to deliver the object to the *depositarius*, or the *locator* or letter for hire to the *conductor* or hirer. In its more restricted sense it is the corporeal act by which the possessor intentionally puts another into possession of a real right, which some term *traditio vestita*, but the delivery in which such intention is wanting is termed *nuda*.

Traditio vestita and *nuda*.

Traditio differs from *adprehensio*.

Traditio differs from *adprehensio* in that on tradition possession is seized, but on the contrary any one may seize without receiving tradition, as would be the case of an inheritance being seized.

Tradition is twofold, actual and feigned.

Tradition is properly only twofold, actual and feigned, or symbolical, which in fact is nothing but a feigned delivery, and formerly applied only to *res nec mancipi*.³

Traditio vera.

Traditio vera is, therefore, when a moveable thing is delivered by the hand of another,—or in case of an immoveable, when the recipient is put into actual possession thereof, and it is agreed that all persons must be removed hence when possession is taken,—or, in other words, that the thing must be *vacuæ possessionis*, for if a party be in possession *animo sibi habendi ut suam possedet*, another cannot transfer; but if the possessor be there as leaseholder, he

¹ I. 2, 1, § 40.

² Grot. de I. Bet. P. 2, 6, § 1, & c. 8, § 25; Ruf. de I. N. et G. 4, 9; Huber. Digress. 4, 8; Titius ad Puf. de O. Her.

1. 1, c. 12, § 14; Strube rechtl. Bedig.

3 b. § 190.

³ Ulp. 19, 7.

can transfer, as the *animus sibi habendi* is presumed to be wanting in the owner.

This delivery implies a mere contract, by which one party agrees to cede the other to accept the transfer under certain conditions,¹ for it cannot be forced upon him.² The consensual contract, however, was alone insufficient to pass the right of a thing, or to create more than *jus in personam*—tradition must accompany it, and the deliverer have a just title himself (*justus titulus*) to enable him to transfer: *traditio*, as above observed, passed no *dominium*.³

Traditio vestita is properly a corporeal act, whereby the owner puts another into possession with the intention of conferring on him a real right. Traditio vestita.

Traditio nuda, where done without this intention, delivery may be performed by giving the thing into a person's hand, or laying it before him; leaving it at his house by his desire; by inducting one into a house, garden, &c.; by allowing a buyer to seal the thing sold, or to put one to watch it;⁴ also the marking of timber by a buyer, with the consent of the seller. Traditio nuda.

§ 998.

Traditio ficta is where a delivery was supposed and took effect by the intention of the owner, and not by a corporeal act,⁵—its chief use is to pass incorporeal rights;⁶ thus the delivery of a deed is interpreted to mean the delivery of the rights or things therein specified. Traditio ficta.

*Fictio brevis manus*⁷ is where the goods are in the possession of a party by way of pawn, and are afterwards given or sold to the holder, in which case the supposition of a solemn delivery is alone deemed sufficient; or if a party direct his debtor to pay over to a third person, it shall be interpreted to be his receipt,⁸ especially if done in the presence of the transferer; but now, for facilitating commerce, a payment by order or letter, though at a distance, is held to be an actual delivery of the money and to be a payment.⁹ Fictio brevis manus.

Fictio longæ manus is the verbal delivery of the possessor of lands lying at a distance by the purchaser,¹⁰ and was so called on account of the arm being outstretched as if touching it, though in fact only pointing towards it. Fictio longæ manus.

Fictio traditionis symbolicae is the delivery of the keys of a warehouse, where the things sold were contained, to the purchaser, and transfers the property by giving the means of obtaining possession;¹¹ or, as above, of a deed in token of the contents—cutting a shaving from a house, and sending it to the purchaser, Fictio traditionis symbolicae.

¹ P. 44, 7, 25.

² P. 50, 17, 69.

³ P. 41, 1, 31.

⁴ P. 41, 2, 51; P. 18, 6, 14.

⁵ P. 41, 2, 1, § 2.

⁶ P. 41, 1, 43.

⁷ I. 2, 1, § 43.

⁸ P. 47, 2.

⁹ P. 12, 1, 15.

¹⁰ P. 41, 2, 18.

¹¹ P. 2, 1, § 44.

effestucatio—or delivering a clod of earth, *scotatia*, in token of the land.¹

§ 999.

Mohammedan
law of delivery.

By the Mahommedan law, the delivery on both sides ought to be simultaneous, and the seller must accompany the act by the words,—“ I have vacated between you and the thing sold, take possession of it ;” nor will a symbolical delivery, as that of a key, have effect without these words, for the mutuality of intention must be expressed: the delivery must, however, succede the sale. A slave is held to be delivered on making a step forward at the command of the new master, and the surrender of a house is held to be invalid in which there remained aught belonging to the seller not included in the contract, for there must be an entire divestiture on the part of the seller, and an entire vacancy of possession—actually where that is possible, or constructively and by word where not.

Vacancy of pos-
session de facto,

or de jure re-
quisite.

Articles consisting in weight or capacity, when specified, are sufficiently delivered by being weighed and measured in a vessel of the purchaser, or in one borrowed by him from the seller. Delivery to a person in the purchaser's family is insufficient. A slave girl is held to be delivered by the seller when her husband, to whom the purchaser has given her, has had sexual connection with her.

§ 1000.

A consideration
is a necessary
ingredient in
delivery.

A corporeal thing may be delivered ; and, being so delivered, is alienated from its owner, of whatever species it may be, subject to certain conditions.

The first requisite is a sufficient cause or consideration to justify the delivery, for no man can be supposed to part with his right but for some reason ;² therefore, if there be no such reason, it is presumed to be a gift.³ But even in this case a cause will be presumed, because the gift will not be irrevocable, unless it appear to be made advisedly and after deliberation,⁴ for the form of tradition prevents rash alienation. It is not pretended that there must be a real cause, for it is sufficient that the party delivering imagined or was of opinion that such cause really existed, though he might be mistaken therein.⁵

Disagreement
as to cause of
delivery.

But here a question arises,—for if, for example, one party deliver to another for one reason, and the latter one accepts it for another, does this disagreement as to the cause prevent an alienation ? as, if money be only deposited by one party for custody, but is received by the other as a loan or gift, it cannot be here said that the property is alienated by such delivery, for there is no mutuality of intention between the contracting parties,⁶

¹ C. 8, 55, 1 ; P. 18, 6, 14, § 1 ; P. 18,

1, 74 ; P. 41, 2, 1, § 21 ; P. 41, 1, 31.

² P. 41, 1, 31. ³ P. 38, 1, 47.

⁴ P. 22, 2, 5 ; P. 50, 17, 53.

⁵ P. 12, 6, 65, § 2.

⁶ P. 44, 7, 55.

which is requisite upon passing of any right; or let the case be put stronger, and let it be presumed that both parties intend an alienation by the delivery, and are persuaded that there is sufficient cause for it, and yet do not agree in the same cause, albeit it be a sufficient one. Thus, if one party deliver money as a gift, and the other accept it as a loan only,—here each cause on either side is sufficient for alienation, which was not so in the other case, and therefore such delivery may well take effect, and the disagreement in opinion as to the reason should not prevent it where there is a mutuality of understanding as to the thing itself.¹ This decision is generally approved of by Julian;² Ulpian is thought by some to differ from him in this particular instance of delivering money as a gift, and of accepting it as a loan, for he says it is neither a gift nor a loan, and therefore the money seems not to belong to the receiver.

Selling, *venditio*, is a good cause of delivery if the buyer pay the price, or otherwise satisfy the seller, or give security or a pledge of payment and it be accepted,³ otherwise the thing so delivered may be recalled: this, though a law of the Twelve Tables, and connected with the old system of *mancipatio per æs et libram*, is also part of the law of nations and nature; but if the seller trust to the faith of the buyer, it is thenceforward his.

Sale is a good consideration for delivery.

Nevertheless, the bare will of the owner will sometimes suffice to transfer a thing,—as, for instance, if any one have lent goods for a certain use on condition of their being returned in *specie*, called a *commodatum*, or deposit them with another on condition of restoration on demand, called *depositum*, and in English simple bailment, and have subsequently sold, given, or granted such thing in dower. For although he have not delivered it for that reason, nevertheless, inasmuch as he suffers it to become the property of the then possessor, property therein is acquired as much as if delivered in the first instance with that avowed intent.⁴

Sometimes the mere will of the owner is a good consideration.

Nor does it import whether the owner have made the livery, or another have done so, to whom the possession was allowed, at his desire; because if the free management of all his affairs were permitted by the principal, in virtue whereof such agent sold and delivered, the property vests in the receiver.⁵

With respect to the person delivering, the delivery may be by an agent.

With respect to the thing delivered, it must be such as is not exempted from public commerce, for should delivery of such thing even take place, it would be ineffectual, and no alienation will follow.⁶

With respect to the thing delivered, it must be in commerce,

The livery must be made by one who has the right to alienate—as owner, agent of owner, as guardian or proxy—and the contract be assented to on both sides.⁷ One must deliver, the other

and made by one who has a right to alienate, and there must be mutuality of consent.

¹ P. 41, 1, 36.

² P. 12, 1, 18.

³ I. 2, 1, § 41.

⁴ I. 2, 1, § 42.

⁵ I. 2, 1, § 41.

⁶ P. 41, 1, 20.

⁷ P. 44, 7, 55.

accept, and there must be a capacity to convey and take,¹ but it is not necessary that the livery be to a certain or known person,—thus medals or money thrown by consuls and prætors² among the populace, *missilia*, was a good delivery, and he who seizes them acquires them by a good title. Such gifts were forbidden, and afterwards again allowed in moderation.³ If two persons buy the same thing of him who is not the master thereof, he to whom it has been delivered has the better title, though the other party may have made the bargain first,⁴ for he ought to have obtained the delivery. A delay in delivery incurs damages, if not the result of uncontrollable events.

Consideration by the law of England is threefold.

In the laws of England a cause or consideration is threefold,—first, the cause of consideration of something of money value; secondly, the consideration of marriage; thirdly, the consideration of blood or natural affection. Without one or more of these considerations, no estate at all passes upon the delivery in a bargain and sale, nor on any other conveyance, to defraud creditors or purchasers.⁵

When he who is not the owner can alienate.

It might happen in some cases that the real owner could not alienate, though he who was not the owner could. *A marito alienari non poterat fundus dotalis*.⁶ A creditor could sell a pawn in his possession, on default of the debtor as to payment of the sum for which the pawn was security, though he was only in possession and not owner; and if such pawn were delivered to the creditor with the understanding that he should distrain it on default, no warning, *denunciatio*, was necessary:⁷ the same occurs when the pawn is redeemable on a certain day, and simply given.⁸

In all other cases three notices were required, calling on the debtor to pay, and notifying that he would otherwise suffer distraint.⁹ Justinian abolished the three notices, making one suffice, but enacted that a period of three years should elapse before the pledge could be adjudged to the creditor, and even the debtor in the two next following years could recover his pawn on paying up the debt.¹⁰

Three notices necessary in England.

Pupils could not alienate without their tutor's authority.¹¹ In England goods cannot be distrained on a writ of distringas, but on affidavit of three calls and notice which might reasonably be supposed to come to the debtor's knowledge, by service on him personally, or on his servant, attorney, or agent, if he cannot be found at his usual place of abode.

Pawnbrokers cannot sell within the year.

Pawnbrokers cannot sell pledges for default before a year and a day, but no notice is required.

Trustees and guardians can alienate without the ward's con-

¹ P. 50, 17, 167.

² I. 2, 1, § 46.

³ Nov. 105, 2.

⁴ P. 19, 1, 21, § 3.

⁵ 13 Eliz. 5; 27 Eliz. 41.

⁶ I. 2, 1, pr.

⁷ I. 2, 1, § 1.

⁸ P. 47, 2, 73.

⁹ Paul. R. S. 2, 5.

¹⁰ C. 8, 34, 3.

¹¹ § 7, 55, h. op.

currence, but are accountable for abuse or damage arising out of such alienations.

§ 1001.

Quasi tradition may be added, which applies to incorporeal rights, and is satisfied by the *exercice* of such right once, with the *knowledge* and without *opposition* on the part of the deliverer,—as, for example, if A having hunted with the *cognisance* of B once over B's ground, and without opposition, the right of chase has thereby been *quasi* delivered by B to A.¹

¹ C. 3, 34, 2, Arg.

TITLE IX.

Jura—Jus ad Rem—Jus in Re—Jus Possessionis—Jus Dominii—Actiones ex Dominio
Oriundæ—Servitutum Jura—Actiones Occasione Servitutum Competentes.

§ 1002.

The triple division of rights.

Jus reale in re or in rem.

Jus ad rem or in personam.

The jus possessionis.

RIGHTS with reference to things are triple in their nature. The first is the *jus possessionis*, or that right which a person has in virtue of mere possession. The *jus in re* or *in rem* is a *jus reale*, or the right in virtue whereof one person has an action for specific recovery, against any possessor of an object who deprives him thereof. The *jus ad rem* or *in personam*, on the contrary, is a personal right, as against a party who is bound to give to, or to do something for another.

The right of possession has been treated of by Savigny, whose exhaustive treatise on the *Recht des Besitzes*¹ gives the most logical and the preferable view of the question, although it differs in some particulars from those of most preceding commentators, and well deserves to be consulted on this subject.

§ 1003.

Jus in re or ad rem as a jus obligationis.

The expressions *jus in re* and *jus ad rem* do not occur in the Roman law books, but are borrowed from the Canon law; and it were more correct to term the *jus ad rem* or *jus in personam* a *jus obligationis*,² which will be best explained by an example:—If a person buy a thing, which *before delivery* be sold to another, who is ignorant of the first bargain, the latter cannot be compelled to give up the specific object, for the right does not follow or attach upon it, for if such were the case a real action would accrue; the remedy is in damages against the seller for a breach of his promise to deliver. If, on the contrary, the object has been delivered, and then come into the hands of a third party, real action will lie, for the object has been reduced into the possession of the purchaser.

¹ This work has been lately translated into English by the Chief-Justice of India,

Sir Erskine Perry; there existed already a French translation of the same work.

² Caius, P. 1, 8, 1, § 1; I. 2, 2, § 2.

If a man give another the right of taking the crops off his land, in virtue of a lease, as a *jus ad rem*, and subsequently sells his land to another, by which act of the lessor the lessee loses his right, by reason of the right being a mere *jus ad rem*. On the other hand, if the same right be granted as a *servitus usufructus*, which is a *jus in re*, it matters not to whom the land pass, for the right of the lessee is not impaired thereby.

Again, one party has a claim of debt on another who possesses a house ; so long as this house is so possessed by the debtor, the creditor can insist on its being sold to pay him his claim ; if, however, the house-owner sell it to a third party, the creditor's claim attaches upon the house only in case he has a hypothetical or mortgage interest in it, in which case the mortgagee may seize the house, unless the claim be satisfied.

The *jus in re* or *reale* attaches on the thing which it follows, nor does it matter into whose hands the object has come, and it is out of this right that the action of vindication arises ; for although an object may have passed through several hands, yet the defect in title of the first illegal acquirer will invalidate the rights of those to whom the object has subsequently passed, and who may be said to possess, or to have possessed adversely, that is to say, against the rights of the true owner. This right is, however, insufficient to afford a remedy in all cases, for the right may consist in a right, in which case there is clearly nothing to which a real right can attach, and the remedy would be wanting without the *jus personale* to enable the claimant to recover, as against the person of the defendant, of which nature is a right of action on a contract.

The *jus reale* or *in re* follows the object of it.

A real right involves a real action, by which criterion it must be judged,—it lies against every possessor. Whoever has a right of inheritance, of pawn, or of property, can institute real actions to enforce them, and recover the objects to which they relate ; and the same with services, for the quiet enjoyment of which real actions may be brought.

Real rights involve real actions.

Real rights may be divided into four species,—right of property,—of services,—of inheritance,—and of pawn. A real right consists in the exclusive right of disposing over the substance of a thing, or in the right of deriving benefit from an object belonging to another, or of obtaining payment of a claim by means of an object.

Quadruple division of real rights.

§ 1004.

Possessio may, it has been seen, be divided into *naturalis* or *civilis*, but the word, furthermore, signifies a right.

Possessio although a fact is also a right. The *possessio naturalis* is a fact.

Possessio naturalis is, it has been seen, a *factum*, and a mere corporeal detention without any reference to right ; suffice it, that the possessor have the object physically in his power, on whom it however confers no ground for usucapion, though there may be *bona fides* on the part of the possessor, because the will to detain¹ the

¹ P. 43, 2, 49, pr.

object, or a title founded on natural law may be wanting, as in the case of a thief; the circumstances may be such as not to convey the right, as in the case of a depositary or trustee,¹ the civil law may preclude it, or because no irrevocable right is conferred, as a husband or wife possesses merely naturally² whatsoever during life is given by the other; when the person is not in a state to possess personally as a slave,³ or when the object *non est in commercio*,⁴ as a *res sacra religiosa*, or *sancta*.

The *possessio civilis* is a right and a fact.

Possessio civilis is the possession of the true possessor, one which, combined with *bona fides*, confers the capacity of usucapion. It requires the *animus retinendi*, a good title, capacity to hold property, and that the object be commerciable. Civil possession is consequently both a *factum* and a *jus*.

Possessio, be it natural or civil, is termed *justa* when of legal origin, and *si ex justa causa possidet*, and is identical with *legitima* or *civilis*. On the other hand, it is termed *injusta* when there is an illegality in the transaction,⁵ as in the case of *possessio violenta*, *clandestina*, or where founded on a transaction contrary to law, *negotium jure civili reprobatum*.

Possessio bonæ fidei and *malæ fidei*.

Possessio bonæ fidei is by one who in fact has no right to the possession, but who conscientiously believes that he has a valid title thereto, but *possessio malæ fidei* is by one who detains an object to which he is aware he has no claim, or thinks he has on mere trivial grounds. Hence, although every illegal possessor does not necessarily possess *malâ fide*, yet every possessor *malæ fidei* is an illegal possessor.

Possessio is a title inferior to *dominium*.

Possessio was a less perfect title than *dominium ex jure quiritium*: thus the *ager publicus* was said to be possessed by those to whom it was granted. Compared with the English law, as far as it concerns land, possession bore the same relation to dominion as the right of a mortgagee to that of the mortgagor in possession, nor was it unlike the interest in a freehold as compared with that in a copyhold.

§ 1005.

Constructive civil possession.

Constructive, which belongs to the category of civil possession, arises where the law implies a corporeal possession, where such is not *de facto* practicable,—here the *animus* alone is the main and sufficient ingredient, and the possession is furthermore allowed to be had for the possessor by the instrumentality of another.

§ 1006.

The physical power of possession may be circumscribed by fact,

Although the physical capacity of retention may by external circumstances be rendered difficult or circumscribed for a certain

¹ P. 10, 3, 7, § 1; P. 22, 1, 38, § 10;
P. 41, 5, 2, § 1.

² P. 41, 5, 2, § 2; P. 41, 2, 1, § 4.

³ P. 41, 2, 24; P. 45, 1, 38, § 7.

⁴ P. 41, 2, 23, § 2.

⁵ Ter. Eun. 2, 3. Hanc tu mihi vel vi vel clam vel precario fac tradas. P. 43, 17, 1, 2.

time, it will nevertheless not be annulled for that cause; as in the case of a vessel at sea, the physical possession, extending to sale, mortgage, or chartering, may be rendered difficult and circumscribed, but is not utterly lost, except by the sinking of the vessel; in like manner the possession of a thing mislaid is not lost, except, indeed, another find it.

Possession may be circumscribed by contract, and as it were divided amongst many persons, for a pawnee, mortgagee, or a lessee is *de facto* possessor; nevertheless, the owner has a right to do any act to the object of the contract which does not interfere with the rights of such pawnee, mortgagee, or lessee: hence several persons can simultaneously possess an object.¹ or by contracts.

As long as the physical power of disposition continues, so long does the possession endure, notwithstanding an absence, or the exercise of the power by another and not in person. This applies to the disposition over a distant estate, or to an object not always in the actual hands of the possessor, as books and the like, for manipulation, although proof of the exercise of the possessive right is not requisite to possession. *Possessio* is, however, utterly distinct from *usus*. Absence of the exercise of possession does not invalidate the right.

§ 1007.

The *affectus tenendi*² consists in the intention not to part from an object at all, at least not at the present moment; and hence it follows that he who is not aware of the presence of a thing within his power—as, for instance, of a treasure concealed on his property—cannot be supposed to have any intention of appropriating it.³ Nevertheless, like all rules, this too must be modified by exceptions arising under particular circumstances: thus a man does not, by becoming mad, *lose* his possession; but it is otherwise with regard to the acquisition, for if already mad he can clearly *acquire* no possession. The affectus tenendi implies an intention to continue to possess.

If anything be given to a child he acquires possession, and if a *paterfamilias* or *dominus* make anything a present to his *filius familias* or *servus*, these acquire a possession the rights whereof vest in the *pater* or *dominus*. This rule as it affects madmen, who can retain, but not acquire possession.

The expressions *possidere* and *possessor esse*, however, differ. Classical jurists include under these expressions only such possession as confers the capacity of *usucapio*, and say of all others, *non possident*; although they sometimes relax this principle, and apply *possidere* to those who, although they cannot acquire by usucapion, do not possess simply in the name of another,—and even go further, and say *possidere* of such as possess the property of another in another's name. Possidere differs from possessor esse.

§ 1008.

Incorporeal objects were not properly subject to possession, because no physical *contractatio* can be had of them. Thence the Quasi possessio.

¹ P. 41, 1, 27, § 2.
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² Paulus, P. 41, 1, 1, § 3.

³ P. 41, 1, 3, § 3.
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term *quasi possessio* obtained; and here it must be observed that the exercise of a service is not *quasi possessio*, for a party having a right to such service may neglect to use such right without losing it.¹ It consists, then, in the physical power of exercise, so long as no obstacles are thrown in the way thereof. A party is in *quasi* possession of a right of aqueduct, of a right of way or light, so long as he is not legally dispossessed.

§ 1009.

The right of the possessor, and advantages of possession.

Possession operates and effects certain legal rights, and certain rights depend upon it,—thus, every possessor is justified in using force in order to protect himself in his possession against every illegal disturber thereof, not only by defensive opposition as regards intruders, but by offensive measures, such as the ejectment of those who have usurped possession.² These measures must, however, be done at once *in continenti*, or as soon as assistance can be had,³ and not *ex intervallo*.

The interdictum unde vi.

There is also a remedy for him who has been violently dispossessed, by means of the *interdictum unde vi*,⁴ for the recovery of possession, and the *remedium spoli*.

Possession is a prima facie title.

In pari causâ conditio possidentis melior est,⁵ where the rights are equally balanced, the advantage inclines to the side of the actual possessor, who may hold to the exclusion of others; and the same maxim stands good where the condition or consideration reflects equal disgrace on both giver and receiver, *in pari turpitudine dantis et accipientis possessoris melior conditio est*,⁶ the receiver retains what he has acquired.⁷

In pari turpitudine.

The possessor is relieved from the onus probandi.

The possessor is generally not obliged to demonstrate the title or justice of his possession.⁸

The possessor is free from the burden of proof, and if the plaintiff fail in making out his case against him, the defendant prevails, even without showing any probable reason for his being in possession of the object.⁹

Also in England.

In like manner, the English law of real property is not satisfied with a plaintiff showing as good a title as the possessor—he must show a better, and in what respect that of the defendant is faulty; hence the proverb of possession being nine points of the law. In criminal matters the case is somewhat different,—not only must the loser of stolen property prove his ownership, but the possessor must exculpate himself by showing reasonable cause for believing that it came into his possession in good faith.

Possessio non vitiosa operates a jus retentionis.

A *possessio non vitiosa* operates a *jus retentionis*, which is inter-

¹ Höpfner, § 282, n. 12.
² C. 8, 4, 1; P. 41, 2, 43; P. 43, 16, 3, § 9 & 17; P. 9, 2, 29, § 1.
³ P. 43, 163, 9, 17.

⁴ Interdicts, as their name imports, were interlocutory decrees between two parties

contending for possession, awaiting the result of a trial of right.

⁵ P. 41, 2, 3, § 1; P. 50, 17, 128.

⁶ C. 4, 7, 2. ⁷ Cap. 3, x. De Probat.

⁸ C. 3, 31, 11; C. 3, 32, 28; P. 6, 1, 24.

⁹ C. 2, 1, 4; C. 3, 32, 28; sed vide actio publiciana.

puted to be the right which one party has to retain his own or another's property, until such other party perform his part of the condition, in default of the performance whereof the right of retention is exercised, and this is termed in English law the right of lien. No right of retention accrues where there is a vice in the possession, such as force, secrecy, or petition.¹

§ 1010.

Possession in another's name, or the possession of the transferee, gives claim to the *interdictum* of *uti possidetis* for immovables; *utrubi* for moveables; *de superficiebus, itinere actuque privato*. These advantages are available equally by the *bonæ* or *malæ fidei* possessor, as against all except him with respect to whom the possession is vitious;² because the possessor is protected in his possession, as he who has a right is protected therein, *possessio defenditur ad instar juris*,³ and *possessio plurimum ex jure mutuatur*.

Possession in another's name is available by the *bonæ* and *malæ fidei* possessor.

Whoso possesses *bonâ fide* as his own property, is not answerable for the damage which he may have done to the object.⁴

Possessio civilis puts a party in a position to exercise the rights attaching to usucapion, to bring the *actio publiciana*, and to acquire the produce of the object belonging to another.

Immemorial possession supplies the defect of a legal title.

These elements collectively constitute the *jus possessionis*.

The *bonæ fidei* possessor is not answerable for damage. *Possessio civilis* makes usucapion possible.

§ 1011.

The party who aims at acquiring the property in an object,⁵ must as a general principle do so by delivery or seizure of his own motion;⁶ the exceptions to this rule are few, and among them may be named the *transitus legalis*.⁷

The *titulus* and *modus acquirendi*.

Very frequently the seizure of an object with the intention of appropriating it is alone sufficient, but in certain cases some transaction must precede the outward form of delivery so as to operate the dominion or ownership together with the possession; and this former, says Thibaut,⁸ is now termed the *titulus*,⁹ and the circumstantial act which completes the acquisition of the ownership, the *modus acquirendi*.

Höpfner separates the *titulus* from the *modus acquirendi* thus: To the acquisition of a real right, he says, two conditions are necessary,—a *titulus* and a *modus acquirendi*. The *titulus* is a legal ground, which makes the acquisition valid; the *modus acquirendi* a form whereby the real right is transferred.

Höpfner's view of this subject.

¹ Höpfner, § 283, n. 8.

² P. 41, 2, 53.

³ P. 41, 2, 49.

⁴ P. 5, 3, 25, § 11, & 31, § 3.

⁵ H. Gephanius ad Let. de A. R. D. Heinold D. ad Eund.

⁶ P. 19, 1, 31, § 2; C. 4, 49, 8; C. 2, 3, 20.

⁷ P. 31 (11), 80 & 77, § 3; P. 36, 1,

63, pr.; P. 39, 4, 14.

⁸ Syst. des R. R. § 736.

⁹ C. 3, 32, 24; I. 2, 1, 40.

The title may be founded on an act,—such as bargain and sale; or in a provision of law,—such as prescription. Thus, in the first case, if a man purchase an object, and has it delivered to him, the purchase is his title, the delivery his mode of acquisition; in the second case, if a man would possess an object by a prescription of three, ten, or twenty years, a fact must actually or constructively pre-exist, such as a grant by way of title, in order to render this mode of acquisition possible. But let us suppose the object to have been granted by one who was in fact not its possessor, and who consequently could transfer no valid title: in such case the long uninterrupted possession becomes at once the *titulus* and the *modus acquirendi*,—that is, the law supplies the want of title. Lastly, if a party find a thing which belongs to no one and appropriate it, the title of possession is the maxim *res nullius cedit occupanti*, and the *adprehensio* or seizing the object is the *modus acquirendi*.

There is therefore a *titulus traditionis*, and a *titulus prescriptionis*, and another by all the other modes of acquisition. There are many legal grounds by which real rights may be acquired in Roman law, and consequently many titles, such as *pro empto*, *pro legato*, *pro donato*, *pro soluto*, *pro dote*, *pro derelicto*, *pro permutato*, *pro transacto*, *pro adjudicato*—the rest being included under *pro suo*.

It appears, however, exceedingly difficult in the abstract to separate the *titulus* in all cases from the *modus acquirendi*, inasmuch as the latter often is of itself the title: indeed, the distinction appears then only possible in the case of a *titulus lucrativus*, or a *titulus onerosus*; the former being that by which an object is acquired gratuitously, as by testament or gift; the latter where there is a consideration, such as of bargain and sale,¹ or of dower—and this is the true and distinct meaning of *titulus*.

Some *modi acquirendi* are founded in a natural right, and confirmed by the civil law; others spring wholly out of the civil law, and are termed respectively *modi acquirendi juris naturales* or *civiles*.

§ 1012.

Dominium
applied equally
to *res Mancipi* et
nec Mancipi.

Dominion was applicable equally to *res Mancipi* or *nec Mancipi*, and by the law of the Twelve Tables a legacy came immediately under the dominion of the legatee.² In the same manner acquired property, escheating or forfeited, was termed *bona caduca* or *ereptitia*, whether by the fiscus or by individuals to whom *caduca* were in some cases granted,³ as wrecks, forfeitures, fines, and escheats, were in ancient times in England.

Dominium
quiritarium
et bonitarium.

There was a difference, however, in the species of *dominion*, which gave rise to the distinction of *quiritarium*, otherwise termed

¹ P. 20, 6, 8, § 13; P. 42, 8, 25, § 1.

² Ulp. 19, 17; P. 50, 16, 120; P. 15,

1, 47, § 2.

³ Cujac. ad Nov. 1, Scrip. Gentil. de Jur. Accres. c. 10.

legitimum or ἐνομοῦν,—and *bonitarium*, otherwise termed *naturale* or φυσικόν. When property was acquired by a Roman citizen in the way provided by law *modo civili*, there accrued to him a right of vindication, *ex jure quiritium*, or that of following his property in the hands of a third party, which was termed *dominium quiritarium*; on the other hand, he could not be dispossessed, and this was consequently the best title which could be had to property.

If property was transferred to a person not a citizen, or to a citizen even in a mode not recognised in the Roman law, *modo naturali*, the *dominium* was said to be *bonitarium*, the object in *bonis esse*,¹ and no action of vindication accrued to the *dominus bonitarius*, his property was lost with possession.²

Justinian abolished this difference,³ nor does any trace of it remain in his laws; nevertheless, the obscurity of some passages in the Pandects is supposed to arise from this cause.

§ 1013.

Dominium is real right of property in a corporeal object, in virtue whereof a party may dispose of the same of his own free-will, except in so far as he may be restrained by law, and may demand it back from every possessor.

Dominium is a real right in a corporeal object.

First, then, it is a right to a corporeal object, consequently it is erroneously applied to such as are of an incorporeal nature, such as tithes, or claims in debt.⁴

When the term is applicable.

Secondly, dominion supposes some specific thing, consequently a number of individual things constitute so many several *dominia*.

Thirdly, the *dominus*, or proprietor, can dispose of the object in every possible way, and perform all species of acts with respect thereto; and, as this is founded in law, it can only be restrained by special legal proviso.

Power of the dominus directus.

Dominium directum, then, is the right of alienating the substance,⁵ in part or in whole, conditionally or unconditionally.⁶ The capacity of disposing of the whole substance according to pleasure,⁷ including the raising of buildings to any height,⁸ beating out new windows,⁹ when no particular law forbids it; enclosing land,⁹ which does not extend to erecting a fortification in time of peace;¹⁰ in short, making any like change in the substance, so it

¹ Ulp. Fr. 116; Theophil. Inst. ad Fin. Tit. de Libertin.

² Sig. de Ant. Jur. Civ. Rom. 1, 11, p. 150; Bynkersh. de Reb. Man. c. 9, p. 131; Briss. Ant. Rom. 4, 22, p. 78.

³ C. 7, 25; C. 7, 31.

⁴ Rebhan Paralipom. Meierian Decad. 5, Qu. 9, and authorities there cited; vide et Justus Meier. Colleg. Jur. Argentoratense, 3 vol. et Endoxa, A.D. 1672.

⁵ C. 5, 23, 1.

⁶ C. 4, 51, ult.

⁷ P. 8, 2, 24; C. 3, 34, 8 & 9.

⁸ C. 8, 10, 12, § 1; C. 3, 34, 8 & 9. H. Kluver, Com. Ictor: axioma cuilibet in suo ad cælum usque ædificare licet. Ien. 1709.

⁹ C. 8, 5, 8, § 5; Puf. T. 1; Obs. 196; Donell. Com. 11, 5, contra; Duaren. Dis. 1, 33; Cuj. Obs. 1, 31.

¹⁰ C. 8, 10, 10, Arg. Westphal. de Lib. Præd. § 23.

be not alone with the view of annoying another (*in æmulationem*). In a word, in the capacity of protecting oneself of one's own motion¹ in all rights of property or use, including that of destroying² the property of another when it endangers one's own, in addition to which the law gives also compulsive remedies. The possessor of these rights is termed the *dominus directus*.

The *dominus directus* can vindicate.

Fourthly, the *dominus directus* can demand the object from whomsoever may be in possession thereof; in technical language, he can vindicate it.

§ 1014.

Two great divisions of dominium, *nuda proprietas* and *usufructus*.
Dominium limitatum.

Dominium is divisible into two chief classes—*nuda proprietas* and *usufructus*,³ the former relating to the substance, the latter to its fruits.

Dominium is said to be *limitatum* when it is circumscribed in any way,—thus, the dominion of a court-yard would be limited when a neighbour had a right of way through it, or of light on that side.

§ 1015.

Dominium plenum et minus plenum, divisum, dimidiatum.

When the two component parts of property are divided, which is the converse of *condominium*, such interest is termed generally *dominium minus plenum, divisum, or dimidiatum*; but when this is not the case, the *dominium* is termed *plenum*.

Two parties are *domini minus pleni* when one has an interest in the property, and the other also an interest in the property, but the whole usufruct. This may be exemplified by the case of feods, where the vassal cannot alienate the feod without the concurrence of his lord, nor the lord without his vassal's consent; but the vassal can alienate the produce, for of that the lord has no part, the usufruct being in the vassal.

Both *dominium plenum* and *minus plenum* may exist in *condominium* and *dominium solitarium*, for in the case of a feod both lord and vassal may have severally a *dominium minus plenum solitarium*; but if in the case of a feod there should be many lords and many vassals, both have a *condominium minus plenum*.

If the whole *dominium* be circumscribed, it is sometimes termed *dormiens* or *naturale*; and that which for a time only is transferred to another, *civile* or *interimisticum*.⁴

Dominium utile.

The *dominus utilis*, on the other hand, is he who has the entire use of the property termed *dominium utile*. Here the *dominium utile* differs from usufruct, for the *usufructuarius* cannot sell or transfer to heirs, which the *dominus utilis* can. It is to be observed, however, that these terms and divisions of *dominium* into *directum* and *utile, plenum* and *minus plenum*, is an invention

¹ P. 43, 27, 1, pr. & § 1-8.

² P. 14, 2, 1; P. 47, 9, 3, § 7; P. 43, 24, 7, § 4; Westphal. l. c. § 47, contra; Schweppe Röm. Priv. Recht. R. 1, B. S. 398-9; Gesterding in Lind Zeitsch. 4,

§ 2; Hft. § 288-296; Thib. P. R. § 702.

³ I. 2, 4, § 4.

⁴ P. 23, 5, 13, § 2; C. 5, 12, 30; Vin. ad. t. 2, 8, pr.; Huber, Digress. 4, 9.

of the middle age, introduced for convenience, and deduced from the spirit of the old civil law.

§ 1016.

Dominium is said to be *irrevocable* when it cannot lapse to the former proprietor, or pass to any other person through or by his authority, against the will or without the leave and licence of its then *dominus*.

Dominium
irrevocabile.

Dominium may, however, be *revocable*, or revert to its former proprietor, of which there exist divers instances.

Cases in which
ownership is
revocable.

The property possessed by the husband in the dower, *dos adventitia*, of his wife is revocable, because, upon divorce without or against his consent, it relapses to the wife, her heirs, or even to a third party.¹ A gift relapses, if the donor afterwards have legitimate children, or the donee be guilty of gross ingratitude.

A vendor who has defrauded the purchaser of above half of the intrinsic value of the object sold can obtain its return; the like where an article has been sold subject to approval, *cum pacto displicentie*, or to be returned within a given time; or where the sale has taken place *cum pacto additionis in diem*, which is a sale with liberty on the part of the purchaser to recede from the bargain before a certain day if a higher bidder present himself; also termed *de retrovendendo* or *cum pacto commissorio*, which is a contract to pay the price before a given time or to forfeit.

The right in revocable property may determine in such a way that the second possessor may be said never to have had a property therein, but that the first possessor may be in a position to commence a real action against the actual possessor, whoever he may be, in which case *dominium resolvitur ex tunc*, as when a contract is continued by which it was agreed that the transaction should under certain circumstances become, or as being contrary to general law, or of its own intrinsic nature, is, *de facto*, null and void. Or the second possessor may be only bound to deliver the object to the original possessor, who is entitled to a real action in this behoof, in which case the right of property ceases with the action, in which case *dominium resolvitur ex nunc*.

When the domi-
nium resolvitur
ex tunc.

When the right in property is determined *ex tunc*, it is said *resoluto jure dantis, resolvitur jus accipientis*. Thus, Titius is the proprietor of a thing, subject to revocation; he alienates to Sempronius, or gives him certain rights in respect of the object, now Titius's right expires *ex tunc*, the right ceded to Sempronius, be it a right of property or otherwise, expires also thereupon. Thus, if the proprietor of a forest sell it to Titius, under the condition that if he do not receive payment within the year, the bargain shall be null, and Titius sell it to Sempronius, from whom he receives payment but neglects to pay the first seller, his right determines

When ex nunc.

¹ P. 24, 3, 35; P. 23, 3, 43, § 1; Ulp. Frag. 6, § 6; C. 5, 13, 1, § 6 & 13; P. 24, 3, 22. By the more ancient law this was not the case, Ulp. l. c. 1, § 5; Höpfner, § 132.

with his default *ex tunc*, and that of Sempronius likewise. If, on the contrary, Titius receive a forest of free gift, and give Sempronius a right of chase, but lose his property by ingratitude to the donor, Sempronius's right of chase does not determine *ex tunc* but *ex nunc*, and the fruits which the owner of a revocable gift has enjoyed remain his,—but if it had been determined *ex tunc*, the fruits would have been returnable, save and except particular cases.

§ 1017.

In respect of property, regard may be had to the person claiming, or to the rights it comprises.

Dominium universitatis is solitarium.

A *universitas personarum* of its nature belongs to the category of individual persons whose property is termed *dominium solitarium*, or in severalty, according to the expression of the English law,—that is to say, without the estate or interest therein being enjoyed by more than one person; whereas that of many is termed *condominium* or *communio*.

Condominium.

§ 1018.

The joint-tenency, coparcenary, and tenency in common of the English law, resemble condominiumia.
Joint-tenency.

This includes the *joint-tenency*, and *coparcenary*, and *tenency in common*, of the English law, which are more subtly distinguished than any which existed under the Roman system, arising as they do out of, and the distinction introduced between, real and personal property. Thus, *joint-tenency* applies to lands or tenements granted by deed or devise, with unity of interest, title, time, and possession, to two or more persons to hold in fee simple, fee tail, for life, for years, or at will. Such estate is said to be in *joint-tenency* or in *jointure*, and each joint-tenant having a right to the whole estate being seized *per my et per tout*;¹ hence, too, he has the *jus accrescendi* or right of survivorship or accretion of the shares of the joint-tenents—the act of any one of whom is the act of the whole, and all must be joined in a suit, though one only be in fact sued.²

Coparcenary.

Coparcenary is the second species of *condominium* in the English law, and arises either by common law or particular custom, where lands of inheritance descend from the ancestor to two or more persons, who together make but one heir. Parceners or coparceners differ from joint-tenents in four points:—1. They claim by descent, not by purchase. 2. No unity of time is necessary. 3. Parceners have a unity but not an entirety; hence no *jus accrescendi* arises. 4. As an estate in coparcenary may be dissolved, and the possession thereby disunited, the title and interest may also be disunited; or the whole descending to and vesting in one person, it becomes an estate in severalty.

Tenency in common.

Tenents in common occupy promiscuously, but hold by unity of

¹ Much discussion has taken place as to the meaning of this expression, of which the first interpretation appears the clearest,

that the tenant is seized of his half particularly, and of the whole generally.

² Black. Com. b. 2, c. 12.

possession but not of interest, none knowing his own severalty but by several and distinct titles—some by descent, and some by purchase in fee simple, fee tail, or for life, or the like.¹

§ 1019.

The actions by means of which a real right may be enforced, are the *rei vindicatio* and the *actio publiciana*.

Actiones rei vindicationis et publiciana.

When no fact or transaction is traversed or denied, the action is either a *querela nullitatis*, which is a prayer that some transaction be declared null and void on a point of law, and that the object of it be returned, or an *actio recissoria*, by which it is prayed that some transaction, the strict legality of which is not denied, be rescinded on equitable grounds, and both are included under the term *qualificata*; but a *simplex rei vindicatio* arises out of an actual ownership, and is termed *civilis*, or one by legal construction, termed *actio prætoria*, or *publiciana*.

Querela nullitatis.

Actio recissoria.

Actio qualificata.

Simplex, civilis, prætoria, publiciana.

The *actio rei vindicationis* is brought by the owner, who must prove his right to the object at issue, by showing that the true owner made over the object to him in virtue of a *justus titulus*, that he has obtained it by prescription, or purchased it from the sovereign of the country; for in this latter case, the title of the vendors is not to be inquired into. This may occur in the case of an intestate inheritance where there are no heirs, and which, in consequence, has lapsed to the fiscus, there being in the estate articles which were not the property of the deceased.²

Actio rei vindicationis.

The owner is likewise at liberty to prove that the object was a *res nullius*—was taken in war by himself or his predecessor—accrued to him by accession—was the produce of an object, the use whereof he had; in certain cases that it was bought by himself with his own money, for it will not lie when another has found the money and laid it out in a purchase. An exception is made in favor of pupils, minors, and churches,³ in cases where the tutor, curator, or bursar purchases something with their money for himself.

The object might be proved to be *res nullius*, &c.

Exceptions in favor of certain persons.

As the *rei vindicatio* lies against every possessor, if the defendant do not possess as owner, but as *depositarius* or *usufructuarius*, he may meet the action⁴ by an *exceptio nominationis auctoris*,⁵ and cause the object to be transferred to the real owner. But one who has fraudulently, *dolo*, ceased to possess⁶—that is to say, has transferred the object to another party to render the action futile, he can be sued.

Exceptions or pleas in answer.

The plaintiff prays that the object be returned *cum omni causâ*, consequently accessions and produce are also due; with respect, however, to the latter, the *bona* or *mala fides* of the vindicator

Prayer of the petition.

¹ Bract. l. 5, tr. 5, c. 26.

² C. 7, 37, 2-3.

³ C. 3, 32, 6; C. 3, 38, 4; C. 4, 50, 8.

⁴ P. 6, 1, 23, pr.; P. 6, 1, 25, pr.; P. 6, 1, 36, et ult.

⁵ C. 3, 19, 2.

⁶ P. 6, 1, 20; P. 6, 1, 31.

Rule followed
as to mean pro-
fits and damage.

makes a great difference; thus, the *fructus perceptos et percipiendos* are due when *mala fides* is evident on the face of the transaction, but if *bona fides* be proven, growing fruits alone can be awarded, and of those gathered such only as are still extant and have not become vested in any one by usucapion—these must, moreover, be replaced, if, during suit, they shall have been wasted by the fault of the defendant; but, if there were *mala fides* on the part of the defendant, it is part of the *causa* that he remedy any damage which he may have done to the object; but the *bona fidei* possessor is not bound to do this before action brought *quia re sua abuti putavit, rem quasi suam neglexit*, although he is responsible for every damage which accrued after suit commenced, or by neglect¹ and not by mere accident.²

The owner is not bound by the rule, to³ indemnify the *bona fidei* possessor for the sum he may have expended in the purchase. Exceptions from it occur when the object has been preserved to the owner by the purchase, or the purchase-money was otherwise expended to his advantage.

§ 1020.

The *actio publiciana* was an equitable remedy for the difficulty of proving a derivative title.

It was Quintus Publicius, the prætor, introduced the equitable action, called, from its author, *actio Publiciana*, to remedy the difficulty the owner sometimes found in proving his title; for, though a man may prove his title so far as he is concerned, yet he may be unable to show from whom he derived it, or, technically speaking, his *auctor*. To make this action available, the period of prescription too must not have expired, since that, of itself, would give a good title. *Si quis id, quod traditur, ex justa causa non a domino et nondum usucaptum petet*, si ea res possessoris non sit, *judicium dabo*⁴—that is, when a party has a *justus titulus*, a *modus acquirendi*, and *bona fides*, but if it be evident that the defendant in possession is not the true owner, the plaintiff shall have his action as if he have formally proved his property, and may require the surrender of the object.⁵

Its foundation.

The foundation of this action is a *dominium fictum, præsumptum, or putativum*, supposed to pre-exist, but can only be used *si res possessoris non sit* against one who is not owner; if the possessor be not owner, the action will lie only in cases where the defendant holds *infirmiore, deteriore, or debiliore jure*,—as, for instance, when he has no *justus titulus*, is not in good faith, or when he has shown a legal title which tells more against himself than against the plaintiff. If the defendant have as good a case as the plaintiff, viz., that one who was not the owner sold and delivered

Its condition.

¹ Höpfner, l. c. § 544, § 332-3, § 283; P. 5, 3, 25, § 11; Ibid. 31, § 3; P. 6, 1, 36, § 1; Westphal. § 933; Glück. Pand. Th. 8; § 588, p. 229.

² P. 5, 3, 15, § 3; P. 6, 1, 21.

³ C. 3, 32, 23; C. 4, 2, 2; P. 3, 5, 6,

§ 8; P. 49, 15, 6; C. 5, 71, 16; C. 4, 51, 3; P. 21, 2, 17; Glück. Pand. § 587.

⁴ P. 6, 2, 1, et 17.

⁵ Jo. Gel. Hofmann Meletem Diss. 7, § 5; Reinold in Opusc. p. 358, et seq. on this edict.; Westphal. § 983.

the object to him, but another putative owner (who, in fact, is not so, and who did not derive his right from the plaintiff) has sold and delivered it to the defendant and present possessor, both are in good faith; here the plaintiff has no remedy in a Publician action, because its object is that the *dominium putativum* of the plaintiff be admitted, and that the defendant be ordered to deliver the matter in issue *cum omni causâ*.

§ 1021.

All species of services are acquirable by contract, which to be valid must not be drawn in terms too general;¹ the grantor must be in a position to dispose of the object in virtue of an unlimited and exclusive property in it.² If an object be already burthened with a service which will be circumscribed by the erection of a new one, the principles of the Roman law forbid the imposition of such new burthen by the owner, even with consent of the possessor of the existing service.³ It has been sought to amend the reading of this⁴ law, but this hardly appears necessary, the evident object being to obviate confusion, and to prevent heirs being prejudiced by an estate being rendered next to useless, by an undue number of services being imposed upon it. Whoever will obtain a service must be capable of acquisition; for instance, in the case of real services, possess the dominant estate wholly and solely.⁵ Originally, the grant must be unfettered by time or condition;⁶ this is now no longer the case. *Quasi traditio* and, what is equivalent to it, the *constitutum possessorium* must be added to the contract in the case of affirmative services⁷ being obtained over the property of another,⁸ when they do not as a matter of course follow the tradition of the dominant property, nor does it matter whether the contract was express or implied; but it is worthy of remark that if a proprietor, being possessed of divers objects, and having used one for the good of the other, sell one, he does so with an implied service attaching thereupon. Should, in this case, the use which has hitherto obtained be indispensable to the preservation of the object alienated, the acquirer thereof can continue the use thereof as a service.⁹ Or a service can be acquired by one party only by means of a decree of the Court, which, however, seldom takes place except in *judiciis divisoriiis*.¹⁰

Acquisition of services by contract. Indispensable terms thereof.

Quasi traditio. Constitutum possessorium.

May be express or implied.

Acquisition ex parte.

¹ P. 8, 4, 7.

² I. 2, 3, § 3; P. 8, 1, 14, § 2.

³ P. 7, 1, 15, § 7.

⁴ Bauer recepta, L. 15, in fin de usufr. lectio depensæ, Lips. 1736 (in op. T. 1, 11, 8); C. G. Richter de Serv. a proprietatis dom. fundo fructuario imponenda, Lips. 1739; Glück Pand. 9 B. § 625; Reckhelm Verpas. unir Aust. Junkler, Ges. n. 7.

⁵ P. 8, 4, 6, § 2, et 18; Westph. § 788.

⁶ P. 8, 1, 4, pr. Cuj. in Pap. adh. 4, cit.

⁷ Vid. § 954.

⁸ This does not apply to services simply reserved. P. 8, 2, 35; P. 8, 4, 6, § ult.; P. 8, 6, 19, pr.

⁹ P. 7, 1, 30; P. 8, 2, 10, 36; P. 8, 4, 11; P. 30, 1, 40, § 1; P. 33, 1, 1. Mævius, P. 3, Dec. 34, Hert. de Serv. facto constituto (op. V. 1, T. 3).

¹⁰ P. 10, 2, 22, § 3.

An exceptional rule¹ of the Roman law has induced the later jurists to declare that the judge has a constant power to burthen with a service an object which cannot be enjoyed without it, on the petition of one of the proprietors.²

Acquisition of
the *servitus*
legalis.

Prescription and Testament are also means of acquiring services, which will be treated of under those heads. The *servitus legalis*, imposed by law, is also a means by which services may be acquired, under which is comprised all the above-mentioned legal restrictions of property³ for the benefit of another.⁴

Usufruct is also by law specially acquired by a father in the *adventitia* of his children,⁵ and in a virile portion of that which his emancipated sons inherit of their mother.⁶ It thus accrues for the benefit of children of a first marriage, from the parents who inherit jointly with such *ab intestato*, or procede to a second marriage in the case of property inherited *ab intestato*, or received generally from a deceased parent, or from property acquired through the inheritance of children.⁷

§ 1022.

The rights of
the *usuarius*.

Usus is living in a house, driving in a carriage, or riding a horse; but *abusus*, pulling down the house, breaking the carriage, or riding the horse to death.

Usus plenus.

Usus plenus is full enjoyment, as the term implies, not merely supplying necessities, but deriving that which ministers to pleasure and enjoyment; whereas, in the case of *usus minus plenus*, necessities are only supplied, and nothing more—it is a limited use.

The *usuarius*
may take no
more than is
necessary.

In that species termed *usus minus plenus*, or *nudus usus*, that user is called *usuarius*, who is not permitted to take more of the produce than is requisite of necessity; whereas, the *usufructuarius* is entitled to all produce: it is, however, a more limited right, *minus juris est in usu quam in usufructu*. Both, however, concur in the following respects:—(1.) That they must use the thing, *salvâ substantiâ*, without prejudice to the substance, which must be neither deteriorated nor its form changed. (2.) Both must give security for proper usage and restoration. (3.) And lastly, the *usus* and *usufructus* originate and are determined in the same way.

Usus defined.

Usus is a personal service due to a person thus defined in the Institutes,⁸—*Usus est jus alienis rebus utendi ad usum quotidianum salvâ rerum substantiâ*. This does not consist in taking the profits; for though an *usufruct* comprehends an *use*, yet an *use* does not include a *usufruct*, or right to take the profits,⁹ for the

¹ P. 11, 7, 12, pr.

² Voet. L. 8, T. 3, § 4; Westph. § 871; J. T. Rivinus de Serv. necess. Lips. 1734; Puf. T. 1, Obs. 240; Glück Pand. 9 B. § 628; Leyser Spec. 109, m. 9; Thib. P. R. § 767.

³ § 1013, h. op. et seq.

⁴ G. C. Harprecht de Serv. leg. Hal. 1725.

⁵ The property is in the child, the usufruct and administration in the father. C. 6, 61, 6, 8, § 5; P. 3, 9, 6, 25, § 1; I. 2, 10, pr.; P. 24, 3, 7, § 12, vid. *adventitia*.
⁶ Nov. 118, C. 1; comp. C. 6, 60, 1, 3; Glück Intestaterbfolge, § 95.

⁷ C. 6, 18, Auth.

⁸ I. 2, 5, 1.

⁹ D. 7, 8, 14, 1.

usuarius cannot take the profits generally, but only his daily use and necessary subsistence, according to his quality and character—if he take more, he may be restrained;¹ but the usufructuary may take things for pleasure, may claim all manner of profit and advantage.

He who has the use of land may take for his daily use,² and for that of his family, all manner of herbs, apples, hay, straw, and wood, also corn for bread, with other fruits of the land, if he bear a proportionate share of the extraordinary charges of sowing, ploughing, and husbandry thereon; and if the profits of the land are sufficient only for his family, it is equitable that the person having the use should alone³ be at the charges of manuring. By daily use is not implied that he take day by day, and that he may not lay up a store for a longer time—say a year,⁴ but if anything remained at his death, the proprietor, not the heir, is entitled thereto.

Use of a farm,
to what it ex-
tends.

During such time as he is taking these profits for his necessary subsistence, being resident on the land, he must not be an hindrance⁵ to the proprietor or his workmen, neither must he pretend to sell his right, underlet it, nor assign it over to other parties, for it is a personal right to him alone, and another might be of a higher character,⁶ and have a larger family. This cannot, however, serve as a general rule, for sometimes it may appear, by circumstances, that the testator designed that the use should be sold or let to hire,—as if the use of a wood⁷ lying afar off, where the cost of carriage would exceed the value of the wood itself, were given by legacy, it might be to no purpose and of no advantage; and if the testator should bequeath the use of horses to one that got his living by letting horses out to hire, the trade of such legatee is a circumstance whence it may be easily inferred that the testator designed they should be let out.⁸

Right of entry.

The *usuarius* of a house must reside therein himself, but not make it over to others, which is also required in other uses, and except the restraint of this liberty, has it as largely as if he had the usufruct. And though he cannot transfer this right, it is not to be understood that he must live alone there, for if he inhabits there himself, he may let out part of the house on rent,⁹ which part would otherwise be useless to him, as being too large for his family; but this is not transferring his right, unless he too forsake the abode. And though he may receive a guest,¹⁰ either for money or friendship, as well as his wife's children, clients, freemen, and bondmen, yet he cannot make a public inn¹¹ or tavern of it, for the reception of all strangers and travellers; it must be confined to his own family, which if it increase must be received, except

Use of a house,
how limited.

¹ D. 7, 8, 22, 2.

² D. 7, 8, 12, 1.

³ D. 7, 8, 18.

⁴ D. 7, 8, 5.

⁵ I. 2, 5, 1.

⁶ D. 7, 8, 12, 1.

⁷ D. 7, 8, 22.

⁸ D. 7, 8, 12, 4.

⁹ D. 7, 8, 4, 8.

¹⁰ D. 7, 8, 2, 1.

¹¹ D. 7, 13, 8.

the granter has directed otherwise. If a married woman, apart from her husband, has such an use granted to her, upon condition¹ that she shall be divorced from her husband, the condition being bad, her husband and family shall live with her therein; and if a spinster² or widow have such gift or legacy, and afterwards marry, such husband shall be also received.

The use of
beasts of burden
and slaves.

He that has the use of cattle for carriage may also use³ them for his wife and children; he shall have the profit of what they earn if employed⁴ on the business of the usuary.

Thus cattle—as horses, mules, asses, oxen—may be employed⁵ to plough, draw, carry burdens, according to the custom of the country; but cannot be hired out by, and for the profit of, the usuary, unless the testator have so directed, or unless the bequest would have otherwise been ineffectual.

The use of pro-
ductive cattle.

In regard of the use of other cattle—as cows, sheep, or goats—the usuary cannot take the milk, lambs, or kids, for those belong to the usufructuary; but he may make use of them to dung his land,—and if he take⁶ a small quantity of milk, it may be allowed, for last wills and testaments are not to be interpreted strictly.

§ 1023.

Rights of the
usufructuaries.

The principles of a usufruct may be summed up under the following six heads:—

- (1.) To the existence of a usufruct *two parties* are necessary,—the *proprietary* and *usufructuary*.
- (2.) It attaches to the *person*,
- (3.) And is a limited right on the *corporeal*,
- (4.) Property of *another*,
- (5.) The *whole proceeds* of which belong to the *usufructuary*, whose right to them is to be exercised,
- (6.) Without *damage* to the *producing substance*.

Usus fructus is being⁷ *jus alienis rebus utendi fruendi salvâ rerum substantiâ*, it follows that the *accessoria* do not belong to him; he may claim half a treasure-trove as *finder*, but not as usufructuary. Again, if a slave in whom a person have a usufruct be named heir, the inheritance is an accessory, not a usufruct, and does not belong to the *usufructuary*; but it appears anomalous that the child of a slave girl in whom a person has a usufruct belongs not to the usufructuary, nor are any of the reasons given: therefore, Ulpian⁸ says the fruit is her labor; Caius,⁹ that a man cannot be a fruit, because all fruits are given for his use, which almost amounts to a play on words. Bynkershoek, however, gives a somewhat better reason,—that a fruit must be what can be

¹ D. 7, 8, 8, 1.

² D. 7, 8, 4, 1.

³ D. 7, 8, 12, 5 & 6.

⁴ D. 7, 8, 20.

⁵ D. 7, 8, 12, 3 & 4.

⁶ D. 7, 8, 12, 2.

⁷ I. 2, 4, pr.; D. 7, 1, 1.

⁸ D. 5, 3, 27, pr.

⁹ D. 22, 1, 28, 1.

destroyed and consumed, which the young of animals can, but not those of the human species.

Opinions are divided as to whether the usufructuary can farm the thing whereto the usufructuary right attaches. The better opinion would appear to be that he can do this,¹ as the proprietor might have done had he not divested himself of the profit; but he certainly cannot alienate the *right*, for that is personal; and if he were permitted so to do, it might never revert to the proprietor, who would lose all hope and chance of reuniting the proprietorship with the usufructuary right.

Object of a usufructuary right can be farmed, but not alienated.

The usufructuary must do small² repairs to preserve the building, but must not alter their form without leave, nor plough up grass land; he must pay the taxes³ and other duties laid upon it, unless there be an order by the testator, or some agreement to the contrary. He ought not to cut down timber trees⁴ unless for repairs, nor trees bearing fruit, for hereby the proprietor would be injured.⁵ If he erect a building upon the estate, he cannot afterwards take it down.

Usufructuary must not commit waste.

He must take care for the cattle that are sick,⁶ recruit their number if any die, plant young trees in the place of those that are fallen, unless they fall by an inevitable accident, and in general act as a wise and prudent⁷ man would act with regard to such an estate were it his own.

Must keep up stock.

An usufructuary right cannot continue for a longer time than the⁸ life of the person claiming this right. It certainly cannot be for ever; but if the heir of the usufructuary be nominated also by the testator,⁹ two usufructs are appointed, for it cannot come to the heir by descent; and if it be given jointly, the¹⁰ survivor shall have the whole, it may be constituted for a less time¹¹ than the life of the usufructuary, upon condition¹² and in a certain manner only; but whosoever has this right may take to himself¹³ all manner of profits arising out of the thing, and dispose of those profits as he may please.

Duration of the usufructuary right.

Inasmuch as the usufructuary cannot claim the profits of the estate, or thing, unless he actually had received and severed them,—as corn and hay from the ground, grapes from the wine, wool from the sheep, milk from the cow, &c. So if he die¹⁴ before they be severed from the soil or thing, they shall not pass to his heir, but shall belong to the proprietor or to him in reversion, for by the death of the usufructuary the title vanishes, so that he cannot have a proportionate rate¹⁵ according to the time

Can only claim gathered fruits.

¹ D. 7, 1, 12, 5.

² D. 7, 1, 65.

³ D. 7, 1, 7, & 27, 3.

⁴ D. 7, 1, 10, 11, 12, 13, § 4.

⁵ D. 7, 1, 15.

⁶ D. 7, 1, 68, 1; I. 2, 1, 38.

⁷ D. 7, 19 & 65.

⁸ D. 45, 1, 38, 10.

⁹ D. 7, 4, 5.

¹⁰ D. 7, 2, 1.

¹¹ D. 7, 1, 4.

¹² C. 3, 33, 82.

¹³ D. 7, 1, 7 & 9.

¹⁴ I. 2, 1, 36.

¹⁵ D. 23, 3, 7.

Right of the
sub-usufruc-
tuary.

he has been in possession ; neither does it seem unjust that the proprietor should take the product of the pains and labor of the usufructuary, for, on the contrary, the usufructuary receives all those profits¹ not severed from the soil or thing (perhaps of the whole year) ; yet that² heir shall claim the expences and charge which was laid out upon the tillage of the land : for equity suggests that the proprietor should not be enriched at the cost of the usufructuary. Moreover, if a tenant have received the whole profits of the land for that year, the heir of the usufructuary shall have the³ rent, though the usufructuary die before the day of payment agreed on, for the usufructuary has no more or less than if he had held it in his own hands.

§ 1024.

Usufructus
verus et quasi.

An usufruct is twofold *verus* (a proper usufruct), and *quasi usufructus* (an usufruct improperly so called).

Usufructus,

A true and proper usufruct consists in the right of taking the profits of those things which do not perish in the using, as the right of taking the profits of land, houses, cattle, and bondmen.

An improper usufruct⁴ is of those things which perish in the using, *quarum usus consistit in abusu* called *res fungibiles*, such as of wine, oil, &c. ; also money, for that too, by continual exchange, seems to vanish from us, as if the use of so much money for life were given in legacy, upon security and caution that so much should be repaid to the heir by the legatee when he die, or so much wine and oil, upon caution and security that at the time of the death of the legatee the value of it should be repaid to the heir in money. The following passage of Ulpian,⁵—*et si vestimentorum usufructus legatus sit, non sicut quantitatis usufructus legetur, dicendum est, ita uti eum debere ut non abutatur*,—has given the commentator much employment.⁶

or caution.

Caution or personal security is to be given of necessity in an improper usufruct ; first, for *fair use*, such as a man would exercise on his own property ; secondly, for *restoration* either of the same thing in kind, safe and sound, or the value of it when the usufruct is at end ; for caution belongs to the very substance of it, and must be given of course, unless remitted. This caution makes an improper usufruct to differ from borrowing, letting on hire, &c. ; for there, security is not necessary. Lastly, that is deemed to be returned safe and sound, the substance and form of which is not changed, which may, however, be done so far as improvement is concerned, for it is a maxim that *fructuarius causam proprietatis deteriore facere non potest, meliorem facere potest* ;⁷ the same principle it will be remembered is applicable to the dealings of a son, or slave for his master, or of a guardian on account of his ward, as well as to the ward's own acts under age.

¹ D. 7, 1, 27.

² D. 7, 1, 58.

³ D. 10, 2, 51.

⁴ I. 2, 42.

⁵ D. 7, 1, 15, § 4.

⁶ I. 2, 4, § 2.

⁷ D. 7, 1, 13, 44.

§ 1025.

Estates for life, for own or *pur autre vie*, created by express deed or grant, most nearly resemble the usufruct of the civil law.

Usufructuary
rights in Eng-
land.
Sub-tenants.

Another incident to estates for life relates to under tenants, or lessees, who have the same or greater indulgences than their lessors or tenants for life; the same as regards estovers and emblements; for they stand in the place of the tenant for life,¹ and greater, for in the case where the tenant for life has not the emblements, because the estate determines by his own act, he does not touch the under tenant, who is a third person.

The lessees of tenants for life had also at common law another most unreasonable advantage; for at the death of their lessors, the tenants for life, these under tenants might, if they pleased, quit the premises, and pay no rent to anybody for the occupation of the land since the last quarter-day, or other day assigned for payment of rent;² this is, however, remedied by statute.³

§ 1026.

As habitation is the *real right* to inhabit another's house without prejudice to the substance, the *servitus habitationis* is very different from the right of him who hires a house to live in.

Rights of habi-
tation,

The possessor of this service can use this house, not only as the *usuarius* for his own personal purposes, but may have chambers more than necessary for luxury; he can let it or sell his right, which the *usuarius* cannot; still, he has a lesser right than the *usufructuarius*, for he can only let it as a dwelling, and not for other purposes. Some lawyers contend he can only inhabit and use those parts of the house which are habitable in the strictest sense, and not the cellars, lofts, summer-houses, and store-rooms; but this is mere argument for the sake of argument, and not founded on logic, but rather the contrary.

Larger than
those of the
usuary.

§ 1027.

In all personal services, it is a reciprocal⁴ obligation to redeliver in *specie* and in good preservation the object to be so returned, and to use it with the same care as own property:⁵ in all cases to deliver the object at the proper period,⁶ *in naturâ*, *in specie*, or *secundum pretium*, conformably with the inventory, or where there is no exemption in this respect,⁷ with a specification on oath; and, in addition to this, to give security for the fair usage and ultimate restitution, or the latter case only, according as the right may be *stricti* or *non stricti juris*.⁸ This *cautio* is usually to be given by sureties, except where the object is determined by pledges;⁹ but when this is impracticable, the judge must decide, whether security on

Acquisition of
personal services.
Obligations
accruing there-
from.
Things to be
delivered
according to
inventory.
Security to be
given.
The cautio given
by sureties or by
pledges.

¹ Co. Litt. 55.

² Roll Abr. 727.

³ P. 7, 9, 1, § 4; Carpoz. P. 2, C. 10;

⁴ 2 Geo. II. 19, 15.

Def. 9.

⁵ P. 7, 9, 5.

⁶ Puf. T. 1, Obs. 98.

⁷ P. 7, 1, 13, pr. § 2; Id. 15, § 3; Id. 65-6; P. 7, 9, 1, § 2, 7, Id. 2.

⁸ P. 7, 9, 1, pr. § 3, 5, 6.

⁹ P. 9, 7; C. 3, 33, 4.

oath be admissible, or whether the object must be sequestered or farmed out.¹

The obligation
of real security.

The obligation of real security is not imperative when it is waived by contract, which happens in cases even of quasi usufruct.² A testator, however, has it not in his power to waive the security in the case of one to whom he has bequeathed a *legatum usufructus*, except, indeed, he lay the obligation of furnishing such security upon another.³ Certain persons are, however, excused from this burthen. A father, in respect of the *adventitia* of his children:⁴ he who receives a marriage portion,⁵—and this principle is extended to the husband in his capacity of usufructuary of the goods of his wife,⁶ and to every one in whom the ownership will certainly vest.⁷ Practice has added to these by analogy—donors, who have reserved themselves a service;⁸ parsons, in respect of their church freehold.⁹ It is, moreover, an admitted principle that those can be called upon to furnish security to whom it has been remitted, in event of misuse of the object.¹⁰ Some assert that a widow contracting a second marriage is legally bound to give security;¹¹ but a simple verbal promise suffices to the fiscus.¹²

Exemptions de
facto.

By analogy.

Remission when
not valid.

How cautio pro-
tects the owner.

In cases where *cautio* is required, the owner is protected in divers ways. He is justified in withholding the object until the *cautio* is actually given;¹³ or, if the matter in issue have been actually delivered, in demanding it back until such time as this shall have been effected, or in compelling such *cautio* by a *condictio incerti*;¹⁴ but if the usufructuary interest have expired, he may resort to the general actions for indemnity, and the return of the subject-matter.¹⁵ If there be no special reason for throwing the fruits into the general funds of the estate, such as have been collected by the owner himself up to the time of the security, delayed without the fault of the owner, being completed, vest in him if he have gathered them himself; but those gathered by the usufructuary cannot be demanded back.¹⁶

§ 1028.

The extinction
of services.

As services which, it has already been seen, may originate in

¹ Lauterbach Coll. L. 7, T. 9, § 10; Voet. 7, 9, § 3; contra Luescher de Cant. ob. usuf. præst. Heidelb. 1811, § 1213.

² Glück Pand. 9 B. S. 654; Westphal. § 628; Noodt. de U. F. L. 1, c. 19; Dnoell. Com. L. 10, c. 4; contra Galvan de U. F. c. 19.

³ P. 7, 5, 8; C. 3, 33, 1; C. 6, 54, 7; Höpfer Com. § 373, n. 3; Lucacher, § 89.

⁴ C. 6, 61, 8, § 4.

⁵ C. 5, 20, 2.

⁶ Carpov. L. 6, Resp. 51.

⁷ P. 7, 9, 9, § 2.

⁸ Voet. 7, 9, 9, § 8; Cocceii Eod. qu. 3.

⁹ Wernher, P. 6, Obs. 58.

¹⁰ Hellfeld Jur. For. § 655.

¹¹ P. 5, 9, 6, § 1.

¹² P. 36, 3, 1, § 18; Id. 6, § 1; Glück Pand. 9 B. § 654; Schönmann Handb. 1, B. S. 348-350.

¹³ P. 7, 1, 13, pr.

¹⁴ P. 7, 9, 7; P. 7, 5, 5, § 1.

¹⁵ P. 7, 1, 5, § 1; Cit. 83, § 2.

¹⁶ P. 7, 5, 5, § 1; P. 33, 2, 24, pr.; vide et Voet. L. 7, T. 9; Emminghaus ad Cocceii, L. 7, T. 9, qu. 1; Cocceii, l. c. Tit. de fruc. ab usuf. ante præst. caut. ad juvenilia, Jen. 1762; Lucacher, § 18.

grant, under which is included donation, sale, exchange, and the like: in *last will* and in *prescription*, so they may cease to obtain by *consolidation*, or *confusion*, *remission*, or *non user*, or *expiry*.

Consolidation, or Confusion, is the vesting of the rights of the *prædium dominans* and *serviens* in one and the same estate; for either the *dominus* of the *prædium serviens* may purchase the *prædium dominans*, or *à converso*, because of the maxim *res propria nemini servit*; and should after this the two *prædia* again become severed, and fall into the hands of different parties as before, the service will not as a general principle revive, but is utterly extinguished by the consolidation,¹ for the Romans look upon services in the light of an integral part of property severed from the parent manor, and when reunited with the principal, to be reconfounded as one drop in a glass of water. The prevention of a too great subdivision of property may be perceived in this rule, for, as it cannot be denied that such services are an evil, so it was the policy of the State to check them,—and, in doing so, a logical principle was kept in view, that of the accessory following the principal. To carry out this more perfectly, it is required that the two *prædia* should be *vicina*, for services can only be justified *ex necessitate rei*; and this necessity has the effect of limiting the practice. Such principle has been lost sight of in modern times; as, for instance, in England, in the case of the tithes assigned to a lay impropriator. In like manner, if the *prædium dominans* lost its own rights, those external rights which it possessed *in alieno solo* are likewise extinct.²

By consolidation or confusion.

The custom in England.

The exceptions to this rule are to be found under Pawns and Pledges;³ but a service lost by Confusion will revive, if founded upon a title granted for a certain period.⁴

Exceptions from this rule.

If services be granted for a fixed period, and conditionally, they will expire with that period⁵ or condition.

§ 1029.

Secondly, services may be extinguished by remission, which is the formal abdication of the service by the dominant, by deed, or by the permission to do acts inconsistent with the continuance of the service or with the contract, with the consent of all parties interested.⁶ The question has been raised, as to how far silent consent will extinguish a service as, for instance, the neglect to take notice of an act contrary to the duty imposed by the service,

Extinction of service by remission.

Must be express, not tacit.

¹ Wernher, Part 8, Obs. 468; sed vide Hombergh Diss. de Reviviscentia Jurium Extinctorum, cap. 2, § 15, add.; Mævius, P. 3, Decis. § 4; P. 8, 1, 18; P. 8, 3, 27. An exception obtained in the case of joint possession of either estate, the joint-owners retaining their rights *pro rata*. P. 8, 1, 8; P. 8, 2, 30, § 1; P. 45, 1, 140, § 2; Westphal. § 927; P. 8, 4, 7; § 1, 9; P. 18, 4, 2, § 18.

² P. 7, 4, 10, § 2, 3, 5; Id. 12, pr.; P. 45, 1, 10, § 7; Id. 83, 5.

³ P. 7, 4, 16; P. 8, 1, 4; Thib. P. R. § 817.

⁴ P. 8, 1, 48; P. 8, 4, 7, § 1, 9; P. 18, 4, 2, § 18.

⁵ P. 7, 4, 15; P. 8, 1, 4.

⁶ P. 7, 1, 64-5; P. 8, 3, 34, pr.

such as the closing a road or door through which the dominant has a right of way ; but here there appears to be no mutuality of contract nor sufficient certainty.¹ Those who support this view, found their arguments on a misunderstanding of a passage of Paulus, *si stillicidii immittendi jus habeam*, at *permisero jus tibi in ea area ædificandi, stillicidii immittendi jus amitto et similiter, si per tuum fundum via mihi debeatur* et *permisero tibi in eo loco, per quem via mihi debetur aliquid facere, amitto jus viæ*. *Permitto* appears to relate to an *express* not *implied* permission, since otherwise, the expression would have been *passus sum*, *patior* being the word used with regard to services, *servitus consistit in patiendi non in faciendo*. Höpfner² thinks the possession is lost, but not the right to the service ; except, indeed, the neglect continues respectively ten or twenty years, where prescription will operate an extinction.

§ 1030.

Extinguishment of services by non user inseparable from prescription. And *usucapio libertatis*.

Servitus simplex et qualificata.

Miscellaneous modes whereby services are extinguished.

It remains to be seen how far *non user* will operate extinction. Prescription is limited to ten years if the parties be present, and twenty if absent, but it is doubled if prescription be sufficient without a *usucapio libertatis* ; that is to say, if it be necessary that the servient do some act to prevent the possible exercise of the right during the time the prescription is running ; some³ jurists draw fine distinctions, and say, that if the service be *simplex*, such as a right of way, it is lost by simple *non user* ; not so if *qualificata*, such as the right of making holes in another's wall to lay in beams, &c. ; others draw a distinction between rustic and urban services ; but following the principle before laid down, it would appear that a *usucapio libertatis* is indispensable ; that if it be a qualified service consisting on the part of the dominant in an *opus manufactum*, its exercise must be opposed, or at least neglected ; if *simplex*, merely opposed, as by blocking up a pathway or the like, prescription therefore supervening the service would be extinguished, and this is in accordance with the provisions of the later law of Justinian.⁴

§ 1031.

Expiry by limitation of grant, but the right follows the property.

Distinction between *dominium utile* and *usus fructus*.

By expiry, or when the right has been granted for a limited time only, and such period has expired.

But the right does not expire when an irrevocable proprietor grants such right, and subsequently sells his property, for it is a real right, and follows the rule *res transit cum onere* ; but when the revocable proprietor grants the right, his property is revived *ex nunc* or *ex tunc* : in the last case it expires, but not in the first.

It will not be without advantage here to remark the difference between *dominium utile* and *usus fructus*. (I.) This latter right,

¹ Thibaut, contra, § 768, and thinks a right to indemnity accrues ; P. 0, 3, 28 ; Voet. L. 8, T. 6, § 5.

² § 368.

³ Thomasius in Diss. de Serv. Stillicidii, § 23, 399.

⁴ C. 3, 33, 16 ; C. 3, 34, 13.

when not expressly granted to heirs, dies with the usufructuary ; but the *dominium utile*, in its nature, devolves on heirs.

(2.) The *usufructuarius* cannot alter the form of the thing, which the *dominus utilis* can.

(3.) The usufructuary derives only the ordinary profits, but the *dominus utilis* the extraordinary in addition.

(4.) The first cannot grant away his right, which the latter can do absolutely, or at least, with few restrictions, they continue one hundred years, that being accounted the extreme legal period of human life. *Capitis diminutio maxima* or *media* will determine the right ; for it is civil death, and precludes his using his right.

§ 1032.

Estates for life will, generally speaking, endure as long as the life for which they are granted ; but there are some estates for life which may determine upon future contingencies before the life for which they are created expire. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice, in these and similar cases, whenever the contingency happens when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone.¹ Yet while they subsist they are reckoned estates for life, because the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And, moreover, in case an estate be granted to a man for his life generally, it may also determine by his *civil* death ; as, if he entered into a monastery whereby he is dead in law,² for which reason, in conveyances, the grant is usually made for the term of a man's natural life, which can only determine by his *natural death*. The representatives of a tenant for life have the emblements.

Expiry of estate for life in England.

The estate held by an incumbent in England in some respects resembles the usufruct of the civil law, but it is a limited and ascertained usufruct, extending to one-tenth of the net profits ; his estate is determined on his death, but his executor may recover arrears of tithes which fell due in the testator's lifetime.

§ 1033.

Destruction will suspend or extinguish services : thus, if a house having a right of service on a neighbouring estate be burned down, the service is suspended, except the case of prescription, until the house be reconstructed ; or if a road be washed away, the service thereon attaching is extinct, except, indeed, the road be restored.

Suspension of services.

Service suspended till a house be reconstructed.

The redemption of a pledge is in the nature of the extinction of

Of redemption.

¹ Co. Litt. 42 a ; 3 Rep. 19 a.

² 2 Rep. 48 b.

³ P. 8, 2, 20, § 2.

a service, as also the expiration of the time or failure of the condition upon which the grant was founded.

Of change in form of the servient.

If the form of the subject of service be gradually changed, but not imperceptibly, or be so covered or coated over as to make access to it impossible, it is considered as destroyed;¹ but here the rule of real differs from that of personal services; in the case of the first, it has been seen the interruption is to be considered as a mere suspension reviving with the object;² but not so in the latter case,³ except when the restitution consists in the laying bare an object covered, the form whereof is, however, not altered,⁴ or where the owner of the service possessed a continuous right thereto under any form of the subject-matter,⁵ as in the case of the usufructuary right of the father in his son's *adventitia*.

§ 1034.

Extinguishment of personal service; by death of possessor.

Exceptions.

Extinction by leave and licence.

Personal services are lost by the death of the possessor of the service,⁶ or when it devolves directly on heirs. On the death of the heirs of the first degree, but in the case of fictitious persons (corporations), its continuance is limited to one hundred years.⁷ But when a usufruct is given to a son, it vests as *adventitium* in the father, and is not extinguished on the death of the son;⁸ or if a usufruct be granted to one during the lunacy of a third party, it does not expire with the death of the lunatic.⁹

Civil death and the loss of liberty,¹⁰ but not, as was formerly the case, the loss of family rights,¹¹ destroy personal services.

Permission to sell the subject-matter of the service by the possessor thereof extinguishes the service.¹²

§ 1035.

Two species of actions appertaining to services: possessory and petitory.

Actiones confessoriae et negatoriae.

Directæ and utiles.

There are two species of actions which appertain to services; the possessory and the petitory. The former of these prays protection in the exercise of a right enjoyed up to that time (*quasi possessio*), rather than claiming any right or to be freed from the burden thereof, but as a preliminary step, the question of being in possession must first be established;¹³ the latter action, however, relates to the right to a certain service, or to the freedom from it, and of such nature are the *actiones confessoriae et negatoriae*; for the former sets up the right to the service, the latter that of the natural liberty, to do which, the usurpation of a service merely gives an opportunity.

These actions are divided into *directæ* and *utiles*, because they are applied to rights which, in fact, are not services; hence, when

¹ P. 7, 4, 5, § ult. & 10, § 1-6, & 12; P. 45, 1, 10, § 7, & 83, § 5.

² P. 8, 6, 14, & 18, § 2.

³ P. 7, 4, 10, § 1, 7; P. 7, 1, 36.

⁴ P. 7, 1, 71.

⁵ Wernher Lect. Com. L. 7, T. 4, § 2.

⁶ C. 3, 33, 14.

⁷ P. 7, 1, 56.

⁸ C. 3, 33, 17.

⁹ C. 3, 33, 12; Westphal. § 910.

¹⁰ P. 2, 4, § 3; P. 7, 1, 1, & 2, § 1.

¹¹ C. 4, 5, 8; id. 10.

¹² P. 44, 4, § 12.

¹³ P. 6, 1, 24; I. 4, 7, § 5.

applied in their strict sense to services proper, they are termed direct ; but equitable, when applied to other claims.

The *actio confessoria directa* may be instituted by one who claims a right to a service for his person or, for something belonging to him, against him who withholds it, throws obstacles in the way of its exercise, or so treats the object of the service as to frustrate the exercise of the right, if some measures were not adopted against the defendant ; the prayer of the petition being, that the service be decreed to the plaintiff, all obstacles thrown in the way by the defendant be removed, and he himself bound to give security to that effect, termed *cautio de non amplius turbando*. This may occur in a question of right of way, of pasture in the forest of another, or of cutting woods.

The *actio confessoria directa*.

The *actio negatoria directa*, on the other hand, arises when the land is free, but another claims a right of service thereupon, and here the prayer of the petition is, that the object be declared free, and that the defendant be ruled to forbear from the usurped service, and give his *cautio de non amplius turbando* as in the former case, which may be done before the judge by word of mouth.¹

Actio negatoria directa.

The *actio confessoria utilis* accrues when a *jus singulare privatum*, or particular right, is claimed, but which, however, is not properly a service when others deny it and throw obstacles in the way of its exercise. The prayer of the plaintiff is, that the existence of the right be acknowledged, and that the defendant should no longer disturb him therein ; but the *negatoria utilis* is brought when another usurps a particular or exclusive right, and will not permit the plaintiff an act inconsistent with such right, here the prayer is, that such exclusive right be declared not to belong to the defendant, and that he throw no impediments in the way which may militate against natural liberty, or whereby common or equal rights may be infringed. Hence the *actio confessoria utilis* premises a particular or exclusive right whereon the action is founded ; but the *negatoria* prevents some act either on the ground of natural liberty, because by the law of nature every man may perform such acts ; on the ground of a common right, because the Roman law permits their exercise to all ; or, lastly, on the ground of equal right, that is, because the act is lawful for the plaintiff as well as for the defendant.

Actio confessoria utilis.

Thus, by the confessorial action, the plaintiff claims the exclusive right as against a defendant who infringes it ; in the negatory action, the plaintiff becomes defendant, and the defendant, plaintiff. The confessorial, therefore, will lie for the ninth sheaf claimed instead of the tenth ; but the negatory, by the proprietors of the oil, that they should not pay the ninth instead of the tenth.

Effect of the confessorial action.

§ 1036.

A possessory as well as a petitory action lies for the protection

Nature of a possessory and petitory action.

¹ C. 6, 38, 3.

Interdictum uti
possidetis et
utrubi.
Unde vi.

services, although not in all cases. The possessor of a *personal* service may have resort to the *interdictum uti possidetis* and *utrubi* in case of disturbance in possession,¹ and of the *interdictum unde vi* in case of dispossession, and that against any party soever.² The *interdictum uti possidetis* applies in real services, if the lord of the *prædium serviens* do no act; or when the lord of the *dominans* do some act being a violation of the possession, not amounting to deprivation;³ but on grounds of policy the *interdictum uti possidetis*⁴ is excluded by the *interdictum de cloacis*, which applies to the repair and cleansing of the sewers,⁵ and is exceptional, in so far as a possession obtained clandestinely, forcibly, or by request, is protected.⁶ In respect of all other services which confer mutual rights on the *serviens* independently of the *dominans*, the general interdicts obtain concurrently with particular interdicts applicable to certain cases.⁷

Special interdicts, except the *de cloacis*, obtain with the general interdicts.

The interdictum
de itinere
actuque privato.

These particular interdicts are the *interdictum de itinere actuque privato*, which every one can have resort to who has been disturbed⁸ in a right of way which he has exercised⁹ in his own name,¹⁰ thirty days in the year last past, neither clandestinely, forcibly, nor by permission, the possession of the predecessors and successors being considered the same person;¹¹ and if any one has recourse to this interdict, on the ground that the repair of the road be impeded, he must thereupon prove his right.¹²

The interdictum
de aqua quoti-
diana et æstiva.

The *interdictum de aquâ quotidiana et æstiva* follows the rule of the *interdictum uti possidetis* in all material points,¹³ and applies in all cases of aquæducts, the possession whereof has been exercised not clandestinely, forcibly, or permissively, and in good faith, within the year last past.¹⁴

The interdictum
de riviis.

The *interdictum de riviis* for disturbance in the repair of an aquæduct, can be obtained on like grounds;¹⁵ in like manner, the *interdictum de fonte*, where a person has drawn water and driven his beasts thereto within the year last past.¹⁶

¹ P. 43, 17, 4; Sav. on Possession, 4 Ed. p. 526-533.

² P. 7, 1, 60, pr.; P. 39, 5, 27; P. 43, 16, 3, § 13, 14, 15, 16, & 9, § 1, & 10.

³ P. 8, 5, 8, § 5; Sav. l. c. § 46.

⁴ P. 43, 17, 1, pr.

⁵ P. 43, 23, 1, pr.

⁶ Id. 1, § 7.

⁷ P. 8, 1, 20; Voet. L. 43, T. 16, § 2;

T. 17, § 1, vide, et authorities quoted by Thibaut, P. R. § 769, n. u.

⁸ P. 43, 19, 1, § 5.

⁹ Id. 1, pr. & 3, pr. § 1.

¹⁰ Id. 1, § 7, 8, 11, & 3, § 4.

¹¹ Id. 3, § 2, 6-10, & 6; Sav. l. c.

¹² Id. 3, § 13, 14.

¹³ P. 43, 20, 1, pr. § 23, 26, 27.

¹⁴ Id. 1, § 31-36, & 6.

¹⁵ P. 43, 21. ¹⁶ P. 43, 22.

TITLE X.

Per quæ Personæ nobis Acquiritur—Peculium Filius Familias—Militare—Castrense—Quasi Castrense—Paganum—Profectitium—Adventitium—Ordinarium—Extraordinarium—Peculia servorum—Adquisitionis modi singulares—Adquisitio per Donationem—Inter vivos—Mortis causa—Propter Nuptias—Adquisitio per Dotem—Dos—Dower by the law of England—Perfection of the Dos—Alienatio Dotis—Adquisitio per Usucapionem et longi temporis Prescriptionem—Per Legatum—Per fidei commissum singulare—Quibus alienare licet vel non.

§ 1037.

PROPERTY might be acquired in two ways, either by a man immediately, or mediately through those under this control, such as a *filius* or *filia familias*, *mater familias*, or *servus*.

Property acquirable through a child or slave.

It has already been seen that, by the law of Romulus, the condition of children was, indeed, not much superior to that of slaves; and what either the one or the other acquired vested forthwith in the father or master, and this extended to all under the father's power; consequently, the wife and daughters might also acquire for the *pater familias*.¹

§ 1038.

The origin of this vested interest of the father in the property accruing to his children, &c., is founded on the *patria potestas*, or patriarchal system of the early Roman State, when the whole family lived together from a common fund,² like a miniature community; the same system prevailed under the patriarchs of the early biblical period, where we find sons and daughters, when emancipated or married, took their portions during the father's lifetime, and thus, again, formed the nucleus of new patriarchal communities;³ in like manner, if a son had separate means of subsistence, the father was in the habit of granting him a *peculium* or *peculiolum*, because in earlier times no revenues were connected with military service and offices of State; but although the administration⁴ of this private property was left to the son, the legal estate resided in the father;⁵ hence it follows that, without

Patria potestas the foundation of this mode of acquisition,

and referable to a patriarchal state of society.

Origin of the *peculium filii familias*.

¹ Sext. Empir. Pyrrhon Hypot. 3, 24; Senec. de Ben. 7, 4; Dionys. Hal. A. R. 8; Suet. Tib. 15.

² Val. M. 4, 4, 8; Plut. Æmil. Paul. 5; Cat. Maj. 24; Crassus, 1.

³ Alluded to in the parable of the improvident son.

⁴ Plaut. Mercat. I. 1, v. 95.

⁵ P. 15, 1, 46, 48; P. 46, 2, 34, pr.

his concurrence, the son could neither make any gift¹ nor manumitt,² the less so could he testate,³ being in all respects the mere attorney of his father, and no one could make a will by attorney.

§ 1039.

Origin of the
Peculium
militare;
its development.

In the process of time the law was relaxed, and a certain amount of private property gained in military service, which the plunder of more civilized states rendered profitable, was allowed; this, then, was the origin of the *peculium militare*; about this time it is supposed that, under Augustus (some think under Julius Cæsar), the right to testate⁴ was granted to military persons, which was soon followed up by the power of manumitting a slave forming part of the booty.⁵ The legal view which afterwards obtained was, that *fili familias* could will such property as freely as if they were *patres familias*, and that the father's rights on the *peculium* came then first under consideration when the son had actually so disposed of the property.

Under Titus,
Domitianus,
Nerva, Trajanus,
Claudius, and
Constantinus.

There can be no doubt, on Ulpian's testimony,⁶ that the privileges attaching to such property were afterwards considerably extended by Titus, Domitianus, Nerva, and Trajanus; and, although it is clear that the military peculiar under Claudius was not unknown,⁷ yet it was Constantine the Great who enacted the first specific provisions respecting it;⁸ and this inclusion of property gained in the civil service of the State, in that of the emperor, or by personal thrift, gives a strong presumption that this was but an extension of the principle upon which the *peculium militare* was founded, and which, for that reason, must have existed long before; the more so, as the words in *sacro palatio militantibus* is used in the Codex Theodosianus, as if by this fiction to bring their *peculium* within the old law.

Extension of this
principle to
other property
by a fiction.

Another exception obtained in the case of property inherited by the child from the mother, which by the old rule devolved upon the father; nor could the mother evade this, except by making the child her heir on condition of the father emancipating it.⁹ Constantine, however, decreed that such property should belong to the child, the father retaining the administration and usufruct only,¹⁰ a provision thereafter extended to other cases.¹¹

The change
under Justinian.

In Justinian's age the old rule, although theoretically existent, had become also impracticable by reason of the numerous exceptions;¹² it was for this reason that the emperor reversed the order of

¹ P. 2, 14, 28, § 2; P. 21, 3, 1, § 1; P. 39, 5, 7, pr. § 2, 4, 5.

² Suet. Tib. 15; P. 37, 14, 13.

³ P. 28, 1, 6, pr.; P. 39, 6, 25, § 1.

⁴ I. 2, 12, pr.; Ulp. 20, 10.

⁵ P. 49, 17, 13, 19, § 3; P. 37, 14, 8, pr.; P. 30, 2, 3, § 8 & 22.

⁶ Vide ante.

⁷ Juv. Sat. Ult. 52.

⁸ C. Th. de Priv. eor. qui ad Sacr. Pal. Milit.; C. 12, 31.

⁹ Plin. Ep. 4, 2, & 8, 18; P. 27, 10, 16, § 2.

¹⁰ C. 8, 18, 12.

¹¹ Id. 6 & 7; C. Th. 8, 19; C. 6, 6, 1—5.

¹² C. Th. 8, 18, 6 & 7; C. Th. 8, 19; C. 6, 61, 1—5.

things, decreeing that, in the case of all property not accruing out of his substance, the father should have the life interest,¹ though not in all cases,² and the child the legal estate without power to will;³ which, however, made no alteration in the *peculium* gained in military or civil service, and confirmed to the child by the *pater familias*.

§ 1040.

The *peculium militare* was everything that a *filius familias* obtained *per militiam* directly or incidentally, and which he would not have gained had he not been in *militiâ*, a term under which the Romans understood, it has been seen, not only service purely of a military nature, but also all offices and dignities, especially the profession of advocates.

The profession of arms was strictly called *militia sagata*, and civil offices *militia togata*; the *peculium* resulting from the first was called *castrense*, and comprehended plunder, largesses from his superiors for good conduct, the outfit given by his father, whatsoever he may have gotten from a comrade, and even from a brother in the same service, and who had made him his heir at his death in consideration of military service; moreover, whatever he may have bought with money so gained. The *peculium castrense* did not, however, extend to camp followers and civilians attached to the army, such as commissaries, sutlers, and preachers. If a *filius familias* brought his suit for things bought with such funds, the rule *res succedit in locum pretii* obtained.

Particularly, then, the *peculium castrense* may be thus stated to consist of every moveable thing (chattel) given by relations or friends to a *filius familias* on his entry into military service, his outfit;⁴ all moveable and immoveable things obtained in war, under which are included presents, and inheritances of comrades of the same garrison, by will made after the commencement of such companionship;⁵ everything a soldier obtained from his wife as heir, but not as legatee,⁶ but no other gift, though made under this condition;⁷ and everything bought with the proceeds of things gained in war,⁸ as above.

Military feods come under this head, but in cases of doubt they must be taken to be *profectitia* or *adventitia*.⁹

§ 1041.

Peculium quasi castrense was obtained by either a secular or clerical office,—as that of an advocate, master, doctor, practising

General basis of the *peculium militare* and *castrense*, which included the proceeds of dignities and possessions.

Militia sagata and *togata*.

Peculium castrense acquirable *per militiam sagatam*.

Peculium castrense.

Feodum militare.

¹ C. 6, 61, 6, pr. § 1 & 8, pr.; I. 2, 9, § 1.

² C. 6, 61, 8, pr. § 1; Nov. 117, 1 & 118, 2 & 134, 11.

³ C. 6, 22, 11; C. 6, 61, 8, § 5; I. 2, 12, pr.

⁴ C. 12, 37, 1.

⁵ P. 49, 17, 11, 16, § 1 & 19; C. 12, 37, 1.

⁶ P. 49, 17, 8 & 13.

⁷ Paul. R. S. 2, 4, § 3; C. l. c. 8; C. l. c. 1 & 4.

⁸ C. 12, 37, 1.

⁹ Styk. de Obligat. Fil. Fam. § 8.

arose out of
secular or clerical
offices ;

the profits of
any public office.

Presents on account
of the liberal professions,

or the gifts of
the royal family.

physician, professor of the sciences; or as a public officer, secretary, keeper of records, Government councillor, privy purse, privy councillor, professor, or priest, &c., saved out of his salary, or gained by fees of office; also from the emoluments arising out of an office¹ requiring no scientific education,—as that of a head groom, fencing or dancing master, or clerk of the kitchen. Lastly, any public office which gave the opportunity of such profits conferred the right of the *peculium quasi castrense*.

If a professor make a colleague his heir as such,—if a father make his son, who is a doctor, physician, or advocate, a present in consideration of such dignity, it comes within the exception; it is, of course, unnecessary to remark that the acquirer must be a *filius familias*.²

It has been a question whether *donata à Principe vel Augusta* be portions of the *peculium quasi castrense*. Now, if the sovereign make the *filius familias* a present on consideration of his military service, the property so acquired is to be classed under the *peculium quasi castrense*; but if it have been made for some other reason, it nevertheless falls under the rules regulating the *peculium militare*.³

§ 1042.

Privileges of the
peculium militare
castrense et
quasi castrense.

The *peculium militare castrense*, or *quasi castrense*, enjoys greater privileges than any of the other kinds, the privilege enduring after the possessor of it has retired from service.⁴ The son possesses a *plenum jus*, and, as far as concerns this *peculium*, is to be looked upon as a *pater familias*, capable of acting as such as far as regards such *peculium*: if he borrow money on the strength of this *peculium*, he is excluded from the benefit of the *Senatus Consultum Macedonianum*,⁵ and is barred from pleading his minority.

Disponible inter
vivos et mortis
causâ.

He can dispose of it *inter vivos* or *mortis causâ*: if he die intestate, it goes to his heirs, children, brothers, sisters, or parents,⁶ nor can the father lay hold of it, according to the older laws of the *peculium*; but if the son be transported, the father retained the *peculium*.⁷ According to the Novels,⁸ the parents inherit the *peculium militare*, together with all the brothers and sisters of the full blood of the deceased. The son can, by virtue thereof, make contracts with his father, nay, he can even prosecute a suit against him, which in other cases he cannot do.

By inheritance.

For the purpose
of contracts and
suits.

¹ *Puncti solatia aliter functi solatia* (salaria functiones); C. 2, 7, 4, § 1; Heinec. ad Brisson. de Verb. Signif. Voc. *Pungere*.

² C. 1, 51, 7; C. 12, 31; C. 12, 37, 6;

C. 3, 28; C. 12, 37, 1; C. 3, 36, 4;

Cocceii Jur. Controv. Tit. de Pecul. Qu. 1.

³ C. 6, 61, 7; Galvan. de Usufr. c. 7,

n. 10, p. m. 58, calls it *quasi castrense*, but perhaps more properly it is *quasi militare*.

⁴ P. 49, 17, 17, § 1; Id. 19, § 2.

⁵ C. 4, 28, 7, § 1; P. 14, 6, 1, § 3.

⁶ P. 49, 17, 2, 9 & 14.

⁷ C. 9, 49, 3.

⁸ 118.

§ 1043.

Peculium paganum, including everything not obtained by *militia* either directly or incidentally, is divided into *profectitium* and *adventitium*. Peculium paganum.

Profectitium is everything received from the father, or that which comes to the *fili filias* through the father,—which latter is implied, though nowhere directly expressed.¹ Of the first description, is an estate granted to the son by the father that he may live on the income thereof; a magazine given up to him for commercial purposes. Of the second description, is a present made by a third party to the son for services rendered him by the father. In all these cases, the children are supposed still to be *sub patria potestate*, otherwise it ceases altogether to come under the denomination of *peculium*. Profectitium.

§ 1044.

Such *profectitium* belongs altogether to the father—that is to say, he has the legal estate and civil possession thereof, the children have nothing but the corporeal possession and administration; but should the father's property be confiscated, the children's *profectitium* is protected by a special edict of Claudius,—*Si patris bona a fisco propter debitum occupata sunt, peculium ex constitutione Claudii separatur*.² Rights of the peculium profectitium;

If the father emancipate his children without demanding this *peculium*, he is held to have tacitly given it to them: in case of the father's death, however, the children must account for such *peculium profectitium* in the schedule of the estate. which passes tacitly on emancipation, but on the father's death must be accounted for.

§ 1045.

The *peculium adventitium ordinarium* is whatever the children gain neither from or through the father, but by their own exertions, from their mother or other persons, therefore derelicts which they acquire by occupation. Peculium adventitium ordinarium;

In such cases, though the property vests in the child, the usufruct belongs to the parent, without the obligation of security, inventory,³ or specification on oath,—together with the right even of sale, in case of necessity, without a decree of the authority.⁴ its usufruct;

This usufruct lasts as long as the paternal power, and even longer, as in cases of emancipation, when the moiety of the usufruct may be retained as a consideration therefor; and in case of the death of the child, this *peculium* follows the rule of intestate property, and devolves upon the parents, and brothers, and sisters.⁵ its duration and inheritance.

¹ P. 7, 1, 21 & 22.

² P. 4, 4, 3, § 4; Vin. ad I. 2, 12, pr. n. 5.

³ Puf. tom. 1, Obs. 98, § 18.

⁴ C. 6, 61, 8, § 5; C. 3, 32, 14; C. 4, § 1.

51, 3; C. 8, 45, 14; Thibaut, P. R. § 325; Glück, P. Th. 14, § 909, vide, et Höpfner, § 433, n. 3.

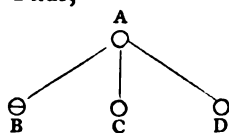
⁵ Nov. 118, f. 2, originally C. 6, 56, 7,

§ 1046.

Peculium ad-
ventitium extra-
ordinarium,

how devolving
upon heirs.

The *peculium adventitium* is said to be *extraordinarium* in cases where the property has been gained *against* the father's consent, as in case of an inheritance which the father has refused and the son accepted, or when left with an express condition excluding the father, in such cases the father has no usufruct; or when a child dies and the property devolves on the brothers and sisters, in this latter case the father has no usufruct of their portions, Thus,—



B dies leaving 300 aurei. A, the father, has no power over the 200 divided between C and D. This arises from the provision of Nov. 118, 2, for the Codex gives the father nothing, — *nullum usum ex filiorum aut filiarum portione in hoc casu volente patre sibi penitus vindicare, quoniam pro hac usus portione hæreditatis jus et secundam proprietatem per presentem dedimus legem*. This is, however, only applicable to intestate successions, and not to cases arising out of wills or contracts where the father inherits in common with his children. Lastly, the case mentioned in the *Sctum. Trebellianum*¹ belongs to this place. The father was instituted heir under the condition of restoring the inheritance to the son when he passed from under the *patria potestas*; the Emperor Hadrian decreed, however, that if the father betrayed his trust and wasted the property, he should deliver it over during the continuance of *patria potestas*, and lose his usufruct.

Ordinarium
regulare minus
plenum.

Hence that *peculium* in which the father has a usufructuary right has been called by modern jurists, *ordinarium regulare minus plenum*; that in which he has none, *extraordinarium regulare plenum*.

Disponibile by
the filii familias
inter vivos et
mortis causa.

The son can dispose of this latter *inter vivos* or *mortis causâ*, at his pleasure, but not by will, because the *testamenti factio* belongeth not to *filiis familias*, except in the exceptional case of *peculium militare*; in which case, they are regarded as *patres familias*.

§ 1047.

Acquisition by
slaves.

The legal estate
of the peculia
servorum is in
the master.

A slave cannot possess anything for himself, for everything he apparently acquired vested in his master, who may then unconsciously become entitled to property; the slave cannot, however, assume possession without the consent of the master, for possession is the detention of an object with the intention to retain it;² but in the case of an inheritance the master must give a direct order, for if a slave acquire a thing without order, which the master afterwards finds advantageous, he may retain it or not, as he

¹ P. 36, 1, 50.

² I. 2, 11, § 3; contra vide I. 41, 2, 1, § 5; Id. 4, & 44, § 1.

please ; but in the case of an inheritance, he has no option but to keep it, if once accepted.¹

As far as the slave's own *peculium* was concerned, which the owners seldom deprived them of, it was usually acquired by thrift and economy in their board wages, termed *menstruum*,² amounting to five bushels and five denaria, which they received instead of their keep or *demensum* ;³ the sum so amassed they put out to interest or traded with it, acquired themselves slaves, termed *vicari*, and often became even rich themselves.

Peculia servorum ex abundantia gratia domini.

Moreover, as the patrician Romans considered trade below their dignity, and were yet unwilling to forego the profit, they carried it on through their slaves, who were the ostensible traffickers, for whom the owner was, in fact, responsible, and for whom, on the other hand, they acquired ; and although a master possessed a mere usufruct in a slave, yet what such slave acquired accrued to the master, for he had a right to the labor of the slave, and, consequently, to whatever that labor produced, without having a right to the slave himself.

Patricians traded in the name of a slave, and so acquired through them.

§ 1048.

According to the old law, filii familias and *servi* were the only persons through whom property might be acquired ; the later laws, however, let in the principle of acquisition by attorney *per procuratorem*, and first of all was acquired, — the *possession*, as when he enters for me ; secondly, the *property* when he buys at my request and receives delivery. The *right of pledge*, as when he lends my money on a house. *Servitudes*, this has been questioned,⁴ but on no sufficient grounds. If the attorney obtain quasi possession in my name, he has acquired the servitude for me.

Acquisition generally by children and slaves.
The possession.
The property.

The right of pledge.
The acquisition of services ;

Right of heritage could, on the contrary, not be acquired by attorney *pacta successoria*, being wholly prohibited.

of inheritance ;

This is not the case in GERMANY at present, where, moreover, one may acquire by the act of a friend acting of his own motion, and without authority.

in Germany.

§ 1049.

Property might be acquired either of natural or civil right ; which latter is either singular, whereby particular things only are acquired, being parts of some integer,—these *modi singulares* are *donatio*, *usucapio sive longi temporis prescriptio*, *legatum*, and *fidei commissum singulare*, which are treated of in this title,—or *universales*, which belong to the next, and consist in *hæreditatis acquisitio*, *bonorum possessio*, *acquisitio per arrogationem*, *addictio libertatem servandarum causâ*, *acquisitio per sectionem bonorum*, *acquisitio per Sctum. Claudianum*, to which may be added, though

The singular and universal mode of acquisition.

¹ P. 28, 5, 88.

² Sen. Epist. 71 & 10, 40.

³ Ter. Phor. 1, 1, 5.

⁴ Lauterbach Coll. Th. pr. Tit. de Serv. § 9 & 932 ; P. 41, 1, 13, 59 ; P. 41, 2, 1, § 20 ; C. 7, 32, 8 ; C. 7, 10, 2.

not mentioned by Justinian, *successio fisci in bona damnatorum et vacantia*. By assuming the monkish habit, and *conventione in mænum sc. mariti*.

1050.

A gift is a free transfer of property, and a *modus acquirendi*, or at least a *titulus*.

A gift is a means by which property is transformed gratuitously, or without consideration, *nullo jure cogente*.

If the object be at once delivered, there is a perfect *modus acquirendi*; but if there be a mere promise, there is a *titulus* only, and the *donatarius* acquires a *jus ad rem* or mere right, but not possession, and in this case the gift may be coupled with a condition; it is, in fact, a contract to deliver an object without consideration.

Was Justinian right in classing it among the civil modes of acquisition?

A question has arisen as to whether Justinian was correct in assigning gift a place among the *modi acquirendi civiles*, because it is not unknown to natural law. In support of Justinian's arrangement, it is said, that gift was accompanied by the civil condition of stipulation; that gift, in contemplation of death, required five witnesses; that the donation, in contemplation of marriage, is unknown to natural law; and Contius thinks gift is not valid without tradition.

Grounds pro.

Grounds contra.

On the other side, it is urged that the promise gave a right of action before Justinian's time. That the question resolves itself into this, whether tradition is a civil mode of acquisition, and that the fact of the civil laws prescribing positive conditions will not make a *modus acquirendi* civil. That if the law of nature ignores the *donatio mortis causa*, it is not, for that reason, a civil mode of acquisition. That it cannot be proved by natural law that no gift is valid without tradition, and that if it were valid, the case is not proved. Justinian, however, appears to be right,¹ for an action is certainly of civil institution; and, at all events, if it were not a civil mode of acquisition before Justinian, he made it so.

§ 1051.

Gifts are of various kinds.

Donatio, or gift, is a civil mode of acquisition.

Donum.

Generally gifts are either *simplices*, such as are given of mere free will, or *remuneratoriæ*, such as imply some consideration, which may be *mortis causâ*, *inter vivos*, or *propter nuptias*. *Donum* is a generate term applicable to all gifts, though sometimes used in a narrower sense, for gifts by the rich and powerful to the poor or indigent, also largesses given to soldiers in camp; but *munus*, a particular one, being such as were given by a friend, client, or freedman, for the protection afforded him by his patron.²

Munus, the difference between them.

Munus more particularly applied to a gift on account of services rendered resembling the *honorarium*, from the term as applied to a public burthen or office, and thus *munus* is the contrary of *donum* in its narrower signification, for *munus* was given by the inferior to the superior, *donum* by the superior to the inferior. Clients

Of clients.

¹ Höpfner, § 408, thinks otherwise.

Ulp. P. 50, 16, 194; Marcian. P. 50,

² Corn. Fronto de Differ. Verb. p. 1331; 16, 214.

sent their patrons *munera* for managing their legal or other business; freedmen, for the same reason, or out of gratitude, or *propter operas*; ¹ slaves, at certain periods of the year and on certain occasions, such as new year gifts on the kalends of January, on the marriage or birth of children or grandchildren² on their birthdays, initiations, &c.

Of freedmen.

Of slaves.

On birthdays, and on new year.

The emperors also received new year's gifts³ under Augustus. Tiberius, however, checked by his edict the practice, grown into an abuse, and refused the *strenæ*; ⁴ but Caligula revived it by edict,⁵ and so it continued until Claudius again forbade the practice by edict;⁶ later, however, scarcely any of the emperors refused the so-called *munuscula*.

Gifts checked by the emperor.

Although provincial magistrates were forbidden to accept gifts, whether under the denomination of *dona* or *munera*, yet they were allowed to take *xeniola*, gifts from strangers, as the word imports.⁷ Cicero,⁸ however, appears to have rejected even these when in office.

Provincial magistrates forbidden to take gifts.

The Ottomans have three sorts of presents. The general term is *Bachshbish*, *بخشیش*, being a small gift in money from a superior to an inferior. A present between equals is termed *Hedyet*, *هدية*; *احسان*, *Ihssan*, a largess, royal benevolence, grace, or goodness, is seldom applied but to persons in high station, such as the Sultan. *Athyiet*, *عطية*, a gift, present, benefit,—this word is more generally used when speaking of a present from a superior. *Peshkesh*, *پیشکش*, is a present from an inferior to a superior in the hope of a return.

Gifts in the Ottoman empire.

New year's gifts.

The new year was celebrated by presents of sweet things of various kinds⁹ for good omen,—probably the practice of throwing sugar-plums about during the carnival at Rome has its origin hence; they appear to have been given chiefly by the poorer classes, for the rich sent objects of gold and silver, especially to the emperors;¹⁰ hence the *aurum oblatitium*, which occupies a whole title in the Codex Theodosianus. There were, however, other days upon which *strenæ*¹¹ were given. Tiberius, however, limited this practice to the kalends of January, by edict.¹²

At the *Saturnalia*¹³ the men were in the habit of giving and receiving *strenæ* or *sigillaria* (*munera*), and *apophoreta*, things to be carried home, *ἀποφόρητα*,—the women on the *matronalia*.¹⁴ The Publician law, so called from its mover, the tribune of that name, confined the avidity of patrons to presents of corn to the rich.¹⁵

Gifts at the Saturnalia and Matronalia.

¹ Caius Inst. 2, 9, 4; Quinct. Decl. ult.² Ter. Ph. 1, 1, 3.³ Suet. Oct. 57.⁴ Dio. Cass. 57, 613.⁵ Suet. Calig. 42.⁶ Dio. Cass. 50, 659.⁷ P. 1, 16, 6, § 3; P. 1, 18, 18.⁸ Ad. Att. Ep. 5, 10.⁹ Mart. Epig. 8, 23 & 13, 27.¹⁰ Suet. Oct. 57; Theod. et Arcad. Ap. Symmach. Epist. 10, 28.¹¹ Fest v. *Strena*, 447.¹² Suet. Tib. 34.¹³ Suet. Oct. 75; Mart. Epig. 13 & 14; Suet. Claud. 5; Spartian Hadr. 17.¹⁴ Tibul. Elig. 3, 1, 1; Mart. Epig. 10, 24.¹⁵ Macrob. Sat. 1, 7.

Birthday presents.

Birthdays were at Rome, as now, an occasion of reciprocal presents.¹ It had been previously the custom to send birds² and signet rings, *sigillaria*, or small images, in honor of Saturn,³ rings, little crescents, and like feminine ornaments,⁴ natal vestments and the like; and not only were gifts received on birthdays, but also made.⁵

Initiation gifts.

Male children were named and initiated with divers solemn rites in the temples⁶ (*lustrabantur*) on the ninth day, females on the eighth day, a striking coincidence with the Hebrew custom; and on those occasions the friends and relations of the parents were invited to a banquet,⁷ where presents were made to the child or the father,⁸ as is at present the custom at christenings.

Marriage presents.

The *munera nuptialitia*⁹ were so much a matter of necessity, that no one could appear amongst the guests without a present for the bride and bridegroom. These are the gifts mentioned by the jurists, and were occasionally so considerable as of themselves to amount to a *dos*.⁹

The *Xenia* given by strangers.

The same liberality was shown in making presents to strangers, termed *xenia*;¹⁰ and many instances are on record where the rich, and those who wished to obtain popular power, endeavoured to secure the support of the plebeian class by unwonted liberality,¹¹ to the extent even of making up the sum sufficient to confer the knightly census.

§ 1052.

Lex Cincia restrained gifts.

In order to restrain such extravagant gifts, Marcus Cincius Alimentus, the tribune, deemed it necessary, A.U.C. 549, to introduce the *Lex Cincia* before alluded to, and otherwise called *muneralis*,¹² the first clause of which was directed against the gifts given for pleading causes,¹³ which, although originally honorary, and given at the Saturnalia, &c., as has been before mentioned, lapsed into claims on the part of the patricians, and thus became an intolerable burthen on the plebeians.

Advocates' fees restrained.

The *Lex Cincia* becomes obsolete. Revived by Augustus, with penalties. Modified by Claudius. Restored by Nero.

The Cincian law, however, was by degrees forgotten and disregarded, and the old abuses recurred, until Augustus revived the law, adding quadruple penalties on transgressors. It, however, was again disregarded; and Claudius, finding it impossible to abolish the practice altogether, modified it by decreeing that more than *dena sestertium*, 10,000 sesterces, should not be given for pleading a cause.¹⁴ Nero restored the law in its former

¹ Mart. Epig. 9, 65.

² Mart. Epig. 9, 56.

³ Macrob. Sat. 1, 13.

⁴ Plaut. Epidic. 5, 1, 33.

⁵ Grut. Inscr. 414, 2 & 571, 1.

⁶ Suet. Calig. 25; Pers. Sat. 2, 31;

Fest. v. Lustrici, 507; Macrob. Sat. 1, 16;

Plut. Quæst. Rom. 288.

⁷ Jul. Cap. Clod. Albin. 4.

⁸ Ter. Phor. 1, 1, 13.

⁹ P. 50, 16, 195; Cic. pro A. Cluentio, 6, 9; Apul. de Assino Aureo. 6; P. 27,

3, 1, § 5; P. 26, 7, 13, § 2.

¹⁰ Plin. Epist. 6, 32. ¹¹ Id. 6, 31.

¹² Plin. Epist. 6, 31—5, 1—1, 19—3, 21—3, 11—2, 4.

¹³ Plaut. ap. Fest. v. Muneralis, 323.

¹⁴ Cic. Epist. ad Att. 1, ult. Tac. An. 11, 5, 13, 42.

¹⁵ Tac. A. 11, 5.

severity; but towards the end of his reign, or soon afterwards, the former edict of Claudius was renewed. Trajan caused a decree of the Senate to be passed, whereby the litigant parties were called upon to swear that they had neither given, promised, nor given security for, any sum on account of a cause to be pleaded; and after it was decided, it was unlawful for them to give more than the *dena sestertium*.

Trajan restrains advocates' fees by oaths of parties.

This law, too, became obsolete, and the *honorarium* of advocates obtained the unworthy appellation of *merces*; nor did the *jurisconsults* hesitate to admit an action of *locatio conductio* between advocates and clients.¹ But this law had been hitherto frequently evaded by means of *xenia*, *strenæ*, *natalitia*, testamentary depositions, the so-called *palmaria*, *redemptiones litium*, and other and like subterfuges, demonstrating the impossibility of checking abuses.

The law becomes obsolete.

§ 1053.

The *Lex Cincia* contained other provisions respecting gifts, of which there exists no certain information; the learned commentator² before quoted is of opinion that under the same head gifts beyond a certain sum were restrained, and an exception granted; whereby the excess above such maximum might be struck off, although the gift was valid as to the rest; exemptions were, however, it appears, allowed when the donation was public, given as a remuneration for services performed, or with the consent of certain relations.

The *Lex Cincia*, its other provisions restraining gifts.

There is sufficient evidence contained in inscriptions³ to show that, in the case of gifts made to certain persons, mancipation with delivery was requisite except in gifts conditional and *mortis causâ*. Many decrees of the Senate, however, supervened, abrogating some and modifying other parts of this notorious law, so that a gift made between persons related to each other, accompanied by a certain verbal formula, was good, even without mancipation,⁴ which was introduced by the constitution of Pius,⁵ but up to that time relatives and the like followed the *Lex Cincia*, which had become common law⁶ in all matters of gifts; but Pius decreed, somewhat later, that no one should contract as a donor beyond the limit allowed him.⁷

A soldier could not make a gift to his concubine (*focaria*),⁸ nor make her his heir.⁹ It is not ascertainable whether the permission to make gifts without limitation for rescuing a person from robbers

Of soldiers to their mistresses.

¹ P. 19, 2, 38, § 1; Brummeri Com. ad L. Cinc. 3 & 19; C. 4, 6, 9.

² Brummerus de L. Cincia, 12; Ulp. Frag. 1, 1; P. 39, 5, 21, § 1; lb. 24; P. 44, 4, 5, § 2 & 5. These exceptions would not have been necessary if the L. Cincia proprio vigore had declared the excess an invalid gift.

³ Grut. l. c.; Brum. l. c. 14.

⁴ Paul. R. S. 4, 1, 11.

⁵ C. Th. 4, de Don.

⁶ Plin. Ep. 10, 3; Brum. l. c. 13.

⁷ P. 42, 1, 20, 28 & 41, § 2.

⁸ C. 5, 16, 2.

⁹ P. 34, 9, 14; sed vid. Grut. Inscr. 607, n. 3; P. 29, 1, 13, § 2; C. 6, 21, 5; Merrill. Obs. 8, 32, p. 124.

or enemies, upon the ground that such a service can be estimated according to any fixed rule, is founded upon the *Lex Cincia*, or some imperial constitution.¹

§ 1054.

A gift is bad, if made in terms too general.

A gift was bad if made in words too general, as, for instance, "I give the third part of my goods;" the individual objects must be enumerated,²—and the same applied as between father and son:³ this law obtained under Diocletian.

Between father and son.

If a father made a gift to a son who remained in the family, it was to be considered rather as expressive of his will than to be a perfect gift, on account of the unity of person; but the gift was perfect if the son had been emancipated,⁴ or if the father died persevering in the same intention;⁵ but things so given were not subject to usucapion by the son, save adjudged by a decree for dividing the inheritance,⁶ hence parents were in the habit of bequeathing those things by pre-legacy which they had given during their lifetime;⁷ but this was altered by the later law compiled under Justinian.⁸

When valid.

§ 1055.

Registration of gifts.
Chlorus Constantine.
Theodosius and Valentinianus.

Constantine Chlorus ordered that all deeds of gift should be in writing and registered; his son, Constantine the Great, confirmed this constitution.⁹ Theodosius and Valentinianus, however, dispensed with the former, and the latter also when the gift did not exceed two hundred aurei in amount;¹⁰ they are, moreover, said to have abrogated the second title of the *Lex Cincia*, respecting a gift of a certain sum. Justinian, however, increased the sum which required registration to three hundred aurei, and afterwards augmented it to five hundred, certain kinds of donations excepted;¹¹ in the number of which, Cujacius¹² places the remuneratory ones. Writing, nevertheless, appears to have been often used in the time even of Justin.¹³

Justinian.

§ 1056.

Gifts not favored in law.

Presumption is against a gift.

Gifts, as they may be the means of corruption or the effects of prodigality, are not favored in law, and the intention of the owner must be shown by strict proof, for presumption will not suffice; thus, gifts to strumpets,¹⁴ though in fact for the use of their bodies, if proved to be gifts are not void, for an honest woman may receive a gift upon another ground, the law will not relieve the giver, for if blame attach to the receiver, it is equally so to the giver. A consti-

¹ Paul. R. S. 5, 11, 6; P. 39, 5, 34, § 1.

² Cod. Herm. de Don. 1; Ulp. Fr. 19, 6.

³ Grut. Ins. 880, n. 3; Schult. Not. ad Cod. Hermog. p. m. 713, 59.

⁴ C. 8, 54, 11.

⁵ Paul. R. S. 5, 11, 3.

⁶ C. 3, 36, 18.

⁷ Plin. Hist. Nat. 33, 2.

⁸ C. 5, 17, 25.

⁹ C. Th. de Spon. 1.

¹⁰ C. 39, 5, 29.

¹¹ C. 39, 5, 34 & 36; Brum. ad L. Cin. 12, seq.

¹² Obs. 27, 43.

¹³ Hein. A. R. 2, 7, 17, ad fin. 1; Brisson. de Form. 6, 558.

¹⁴ P. 39, 5, 5.

tution of Antonius, however, allowed soldiers to recall the presents which their concubines had obtained from them by flattery,¹ but this does not extend to gifts made to common prostitutes.

§ 1057.

Donatio inter vivos, otherwise called a *proper* gift, then, is when one, out of mere liberality, bestows a thing upon another, there being no law to compel him to it. *Donari videtur quod nullo jure cogente conceditur*,² he dispossesses himself of the property therein, without anticipating the recall of it *dat aliquis eâ mente ut statim velit accipientis fieri nec ullo casu ad se reverti*;³ the donor must, of course, have a perfect right and command of the thing in question so as to be able to sell it if he will, for *cujus est donandi, eidem et vendendi, et concedendi jus est*.⁴

Donatio inter vivos generally is a proper gift.

§ 1058.

The conditions of a gift *mortis causâ* are, that the perfection of the gift depends upon the fact of the death, the possession being deferred till the death of the individual; in short, the gift is conditioned on an event, for if the possession be at once parted with, it becomes a *donatio inter vivos*; and so it is when the gift is dependent on the death of a third party.

The *donatio mortis causa* may be said to occupy a middle place between a contract and gift by last will: regarded as a contract, it wants consideration; regarded as a will, the death of the donor.

Donatio mortis causa generally partakes of the nature of a contract and of a testament.

§ 1059.

Donatio inter vivos is either *relata* or *simplex*, that is, *absoluta*; and this latter may be said to be *remuneratoria* or *modalis*, *sub modo*, thus, what is given with reference to some service done, is called *relata*,—if out of pure liberality, without any reason being assigned, *simplex* or *absoluta*; but should the object be given by way of reward for service done, is called *remuneratoria*; lastly, if anything be given to a person with the view that he first do something that shall benefit himself alone, it is termed *donatio modalis* or *sub modo*.

By the old Roman law, gifts *inter vivos* gave no right of action when not accompanied by stipulation⁵ or actual delivery, so as to bring them within the definition of contracts, and by *verbis solemnibus*. Justinian altered this, declaring⁶ that no form of words should be necessary to give a right to the *condictio*; by these changes a gift became a *pactum legitimum* by bare consent and agreement, *ex nudo pacto* before delivery, to which the law in this particular case, will force the donor and his heirs, if the gift be expressed *per verba de presenti*, and not *de futuro*, though even

Descriptions of donations *inter vivos*;

relatae,
simplices,
remuneratoriæ,

modales.

Did not operate a right of action,

before Justinian.

¹ C. 5, 16, 2.

² P. 50, 17, 82.

³ P. 39, 5, 1, pr.

⁴ P. 50, 17, 163.

⁵ C. 8, 54, 57.

⁶ C. 8, 54, 35, § 5.

the donee were absent at the time of the agreement, for both parties may act by proxy or letter.¹

Is a contract.

In fact, without delivery, it is purely a contract; and if the consent of the one party be wanting, the contract is incomplete; thus Javolenus says, *in omnibus rebus quæ dominium transferrunt, concurrat oportet affectus ex utrâque parte contrahentium nam sive ea venditio sive donatio, sive conductio sive quilibet aliâ causâ contrahendi fuit nisi animus utriusque consentit, perducî ad effectum id, quod inchoatur non potest.*²

§ 1060.

Rights and capacities of the donor and donee.

No one is, however, compellable to perform more than he is able,³ for *qui ex liberalitate conveniunt, in id quod facere possunt, condemnandi.*

By the canon law,⁴ nude agreements are valid.

Before the gift is accepted, the giver may recall it; and⁵ such a right vests in his heirs if the *Donor* die before acceptance, that the acceptance come too late for⁶ *non videntur data, quæ eo tempore quo dentur, accipientis non fiunt*; unless, indeed, in the case of gifts *ad pios usus*.⁷ But if the *Donee* die before acceptance,⁸ his heir cannot consent where the gift is personal, because mutuality of consent is required.

A gift is distinct from a debt.

A gift is distinct from a debt; thus, a *donum* cannot be recovered as a *debitum*,⁹ which it is construed to be must depend on circumstances; but as the law discountenances gifts, even proximity of kindred between two persons sufficeth not to presume a gift;¹⁰ in absence of proof to the contrary therefore, it will be presumed a debt.

Delivery by mistake gives the right to recall the gift; but if wittingly done it is irrevocable, *cujus per errorem dati repetitio est, ejus consulto dati donatio est.*¹¹

Incapacitated persons, deaf and dumb persons, madmen, prodigals, minors,

There must be a *capacity* on the part of the *Donor* as well as on that of the *Donee* to give and receive, for old doating persons, madmen, prodigals, and minors;¹² also, persons deaf and dumb by nature, not by disease or chance,¹³ are prohibited from making gifts, as in the case of husband and wife,¹⁴ before mentioned; from this rule, the emperor and empress are expressly excepted.¹⁵ The wife cannot dispose of her *dos*,¹⁶ even with the concurrence of her husband, except in some peculiar cases.

married women,

criminals.

Criminals under sentence of death¹⁷ cannot grant away their

¹ C. 8, 54, 13 & 20; P. 44, 7, 2 § 2.

² P. 44, 7, 55; P. 44, 7, 2, 3.

³ P. 50, 17, 28.

⁴ C. 66, quicunque 12, qu. 2, c. 1 & 2, hoc. Tit.

⁵ P. 39, 5, 2, § 6.

⁶ P. 50, 17, 167.

⁷ C. 1, 2, 15.

⁸ P. 41, 2, 38.

⁹ C. 2, 19, 11.

¹⁰ P. 3, 5, 34.

¹¹ P. 50, 17, 53.

¹² C. 8, 54, 16.

¹³ C. 6, 22, 10.

¹⁴ P. 24, 1 & 2.

¹⁵ C. 5, 16, 26.

¹⁶ C. 8, 54, 21.

¹⁷ P. 36, 5, 15.

estates; some are, however, of opinion that the disability dates back from the commission of the crime, which is erroneous, on the principle that the incapacity is not the crime itself, but the punishment of it, of which confiscation is a part, and which follows on conviction; but as it is not possible to execute one part of the sentence, viz., death, at the time of the commission of the crime, so it is unjust to apply the other,¹ viz., the confiscation.

These incapacities, or capacities, apply then to the *Donor*; it now remains to examine what capacities or incapacities apply to the *Donee*. Incapacities of the donee.

First, no one can give to himself; for what is once mine cannot be made more so, *quod proprium est alicujus amplius ei fieri non potest*;² nor can gifts be made to a madman;³ nor by a father to his son under power, for whatever the son gains accrues to the father; nay, it is even questioned whether books, which a father gives to his son as necessary to his education, belong to him after his emancipation, or at the father's death? A son so under power cannot give to his father, unless he have goods of his own distinct from his father's goods; the two being, in law, one person. No man can make a gift to himself.
Father and son.

§ 1061.

Next follows the question of *capacity in the thing to be given*; therefore things that cease to be in nature, things sacred or appointed for public use, a freeman,⁴ and that which belongs to another, cannot be given; nor an inheritance by the heir presumptive⁵ before the testator's death, for it is as yet no inheritance; nor can "all goods present and to come" of any person be given away⁶ *inter vivos*, excepting in some special cases.⁷ If there be capacity in the *donor*, *donee*, and *donatura*, all things, corporeal or incorporeal, moveable or immoveable, may be transferred by gift; even actions⁸ may be released gratuitously, or assigned over to another, though this is not so in England.⁹ Also future actions may be transferred to friends, strangers,¹⁰ absentees, by proxies or by letter, or to persons unknown. Capacities of the object of the gift.

With respect to *delivery*, Halifax is in error when he reckons it as a necessary ingredient of donation; for, as we have seen above, a promise on one side, and acceptance on the other, is sufficient to pass the gift, be it even made by proxy, letter, or message,—actual delivery is not required, for the gift passes constructively on the promise only. Delivery not requisite.

Public Registration, however, is required where the gift at the time it is made exceeds in value 500 crowns,¹¹ or about 244*l.* 10*s.*, Its registration.

¹ C. 10, 1, 10.

² I. 2, 20, § 10.

³ C. 8, 54, 17.

⁴ C. 8, 54, 14.

⁵ P. 39, 5, 39, § 2.

⁶ C. 8, 54, 35, 24.

⁷ P. 42, 8, 17, § 1.

⁸ C. 8, 54, 2 & 3.

⁹ C. 8, 54, 33.

¹⁰ C. 8, 54, 6.

¹¹ C. 8, 54, 27.

in order to prevent men parting with their property inadvisedly, or pretend gifts to defraud creditors; for if a gift be made of the whole estate, the creditors may obtain its revocation for the satisfaction of their debts. This sum must, however, be given in one gift,¹ to render it necessary to be entered of record (*actis insinuanda*); for gifts are good without registration if they be *several* and made at different times, though the total amounts to more than the sum of 500 aurei. If, however, a gift be for a greater sum than 500 aurei, it may be valid² for that sum and voidable as to the excess, by *exceptio*, though not publicly registered.

Exceptions from the obligation of registration.

Gifts made to and from the emperor are³ excepted from this rule; but, by a novel constitution⁴ of Justinian, the gifts of the emperor to private persons ought to pass under some public instrument subscribed by the emperor and witnesses.

Gifts made for the ransom of captives,⁵ or those to soldiers⁶ by the *Magister Militum* for gallant exploits performed in war,⁷ and money collected for repairing demolished houses, need not be recorded; but this is not to extend to give a privilege to other pious causes.⁸

§ 1062.

Gifts in England.

In England, *gift* or *donation* is that given without an equivalent or consideration; but if a consideration of any sort, however small, be given, the gift is converted into a *grant*. Blood, or natural affection, is held to be a consideration; but if it be not executed, then it is neither a gift nor a grant, but a *contract*: the first vests property in *possession*, the latter in *action*.

Grants.

Grants of realty.

Such gifts or grants may be of things *real* or things *personal*. Among the first are included all things that savor of the realty, as leases of land for years, surrenders, assignments thereof, and the like, in short, any conveyance of an estate less than freehold or estate tail, whereas a feoffment is of an estate in fee: to such grants must be added a livery of seisin to perfect them.⁹

Gifts looked upon with suspicion. Gifts in fraud of the Crown or of creditors.

Grants or gifts of *chattels personal* may be made in writing or verbally, whereby the grantor renounces, and the grantee immediately acquires, all property therein, of which possession is the best evidence. As in the civil so in the English law, gratuitous gifts are looked upon with jealousy, and a statute¹⁰ has been introduced for the protection of creditors from simulated and fraudulent gifts, and the Crown from losing the advantage of forfeitures in cases of treason and felony by deeds of gifts in trust for the use of the donor. By a later statute,¹¹ grants or gifts of chattels, with intent to defraud, are void as against persons who

¹ C. 8, 54, 34, § 3.

² C. 8, 44, 35.

³ C. 8, 54, 34.

⁴ Nov. 52, 2.

⁵ C. 8, 54, 36.

⁶ Ibid.

⁷ Ibid.

⁸ C. 1, 2, 19.

⁹ Littl. § 59.

¹⁰ Hen. VII. 4.

¹¹ 13 Eliz. c. 5.

might be prejudiced thereby, though good as against the grantor; moreover, all persons privy to such grants shall forfeit half the value of the goods to the king, and half to the party aggrieved, and suffer imprisonment for half a year.

§ 1063.

The *donatio mortis causa* differs from the *donatio inter vivos* in this, that the latter is irrevocable, except under certain circumstances; whereas, the former is revocable, if the donor do not die; something, however, depends upon the *formula*: thus, if a gift in contemplation of a speedy dissolution, be made with the express limitation "that it should in no case be demanded back," *ut nullo casu ejus repetitio esset*, that is, not even if the donor recover, it becomes a *donatio inter vivos*, and as such irrevocable.¹

Difference between *donatio inter vivos* et *mortis causa*.

All objects could be given which were alienable, whether present or future.² An act implying a gift, passes the object.

§ 1064.

If gifts *inter vivos* be once perfect, they are in their nature irrevocable,³ though the giver pretend⁴ that he has thereby defrauded his creditors, for no one shall be allowed any advantage by pleading his own crime; nor even can the rescript of the emperor void such gifts.⁵ Nevertheless, there are three causes for which they may be revoked.

Gifts *inter vivos* if perfect, are irrevocable.

Exceptions.

First, where the gifts are *inofficiosæ*,⁶ and so considerable that a father, son, brother, or sister is thereby deprived of such share, *pars falcidia*, as the law allots him,⁷ it is a question whether the intention *affectus*, or the effect, *effectus lædendi legitimam*, are to be considered. Pufendorf and Walch think the latter: another question is, whether the gift be inofficious as to the whole, or only as to the excess by which the *pars falcidia* is invaded; the better opinion is, that the gift is bad as to the whole.

Inofficiosæ. As to the *pars falcidia*.

The *querela inofficiosæ donationis* is assimilated with the *querela inofficioso testamenti*, in which no notice is taken of the intention of the testator.⁸ In a gift *mortis causa*, the deficiency in the *pars falcidia* is subtracted from the gift.⁹ But if the whole property be given inofficiously, the whole gift is reversible.¹⁰

The *querela inofficiosæ donationis*.

¹ P. 39, 6, 27; for forms vide those preserved by Brissonius de Form. 7, 690, in which much interesting matter is collected, and of inscriptions recording donations to bodies corporate, vide et Plaut. Ap. 4, 1, containing many laws and a deed of gift between a young man, his mistress, and a pimp.

² C. 8, 54, 35, § 4—5; C. 8, 56, 8.

³ C. 8, 56, 2. ⁴ C. 8, 56, 4.

⁵ C. 8, 56, 5.

⁶ C. 3, 20, 1, 2, 3, 4.

⁷ Puf. tom. 2, Obs. 178, and tom. 3,

Obs. 23. This is to be reckoned according to the amount of the property which would have constituted the inheritance if the gift had not taken place, Nov. 91, 1.

⁸ Puf. t. 2, obs. 178, p. 561; Walch, Diss. de Prescrip. Donat. Inofficiosæ, § 5; Id. in Contr. p. 472, ed. 3.

⁹ Wissenbach ad Cod. lib. 5, tit. 29; Harprecht de Jure Deducendi Duas Quartas, n. 640, 641, 671.

¹⁰ Voet. ad Pand. tit. de m. c. Don. § 40; Strykus. Mod. cod. tit. § 4; vide et Höpfner Com. § 412, n. 2 & 3.

If gifts be made successively, the last which infringe the *pars falcidia* may be rescinded.¹

§ 1065.

Causes for which
gifts could be
revoked.

*Ingratitude*² was a cause which operated in the five following instances to avoid a gift :—

1. If the receiver grievously defamed the donor (*injuriae atroces*.)
2. If he laid violent hands on him, (*si manus illatae donatori, or si in pias manus inferat.*)

3. If he damaged his estate, (*si jacturam vel omnium vel majoris partis bonorum inferre voluerit donatoris, or si jacturae molem ex insidiis suis ingerit, quae non levem sensum substantiae donatoris imponit.*)

4. If he laid wait to take away his life, (*si vitae periculum, vel per se vel per alium struxerit.*)

5. If he refused to fulfil the agreements made at the time of the gift, (*si conditionibus donationi adjectis non satisfecerit,*) which properly does not come under the head of ingratitude, and was added by Justinian.

The whole is summed up in the following indifferent verses :—

*Restitui donata placent, si verbera primo,
Aut grave donanti dedecus intulerit,
Struxerit insidias vitae, dederit grave damnum,
Aut si pactorum vult temerare fidem.*

Some would add another cause of revocation, namely, that of the receiver denying relief to the afterwards impoverished giver ;³ this is, however, an equitable reason, which cannot be introduced into a penal statute, the provisions of which are, moreover, explicit.

Causes by analogy.

All acts which may be brought under the above heads will invalidate the gift ; thus, getting the daughter of the donor with child is a species of injury, and the like. But the donor must sue before he die, for his heirs have no right of action, inasmuch as this is a personal injury which he might have forgiven ; indeed, the law presumes the donee has done so, from the fact of his not having sued. Ingratitude to the heirs of the donor gives no cause of action.

As to mean profits.

In cases where the gift is recalled for ingratitude,⁴ the mesne profits cannot be claimed except from the time of the commencement of the suit, for these may be the result of the donee's own outlay and industry. If, however, the gift be sold, or exchanged, or given away to a third party, it is irrevocable ; for, otherwise, an innocent person would suffer for the crime of the donee.

¹ Lauterbach de Querela Inoff. Don. Voet. L. 39, t. 5, § 38 ; Walch, I. C. p. 476—7.

² C. 8, 56, 10.

³ Pro, sunt Struve Ex. 39, Th. 15 ; Vin. ad l. 2, 7, § 2, n. 7 ; Walch Contr. p. 477 ;

contra, Strauss Dis. ad jus Justin Disp. 8, Th. 26 ; Schilt. Diss. Cit. cap. 2, § 22 ; Cocceii in Jur. Contr. h. t. qu. 10 ; Schilter Ex. 43, Th. 20, seq. ; Dietmar Diss. de Don. inter viv. revoc. et m. c. irrevoc. § 16.

⁴ C. 8, 56, 7.

The *supervenientia liberorum*,¹ or subsequent birth of children, was a good ground of revocation, as in the case of a will, because no one can be expected to prefer a stranger's to his own offspring, this is so far thought reasonable; and, as it were a condition implied in the gift (under the word child children are comprehended). If the giver, at the time of the gift, had, or considered, while married or unmarried, that he possibly might have had, children, it is evident that he, in such case, intended to prefer a stranger's children to his own; therefore the gift ought not to be wholly revoked by such children as are born during the giver's life; it is otherwise if born after his death, except in so far as the gift might be inofficious.² The law favors the children, however, as well as the father; and it may be dangerous to disturb a gift which the father had declared on oath he would not revoke in favor of children which might be subsequently born to him.

Supervenientia liberorum, a cause of revocation.

The patron has, however, the right of revoking a gift to his freedman,³ on the ground of subsequent issue; some think this may be extended to other donors,⁴ and it is adopted in practice.⁵

Rights of revocation by the patron.

If, however, the donor have made a gift so large as to bring him to indigence if he fulfil the promise, he may take the benefit of the so-termed competency, and retain sufficient to maintain him in his position,—*Isque ex causa donationis convenitur in quantum facere potest condemnatur*.⁶

Revocation on account of indigence.

It is, however, to be observed, that a gift is not revocable on the ground of indigence, except in cases where the donor parts with his whole estate, or the major part thereof, as to which discretion is vested in the judge.

§ 1066.

These revocations apply merely to gifts which procede from pure liberality, and not to those made for⁷ a good cause, or on condition, for those indeed are, properly speaking, no gifts.

If the gift be even erroneously made on account of supposed desert and merit, it is irrevocable, though it afterwards appear the giver was deceived, for it was made for a cause of which the donor might have inquired more exactly, and indeed it was in his power to make the gift without any cause at all. The gift in consideration of a public duty must not be confounded with liberality, alms, or hospitality.

Gifts made for consideration. In error.

¹ C. 8, 56, 8.

² C. 3, 29, 5.

³ C. 8, 56, 8.

⁴ Hotomann Anucab. Resp. lib. 1, c. 12; Lycklama Studiosior, lib. p. 54, seq.; Jac. Gothoffr. ad C. Th. lib. 8, tit. 13, lig. 3, tom 2, p. 657, seq.; 1 H. Boehmer Ex. ad Pand. tom. 1, p. 233, seq.; Schnellhorn

Dis. de Operatio Donationum ob Supervent. lib. revoc. § 11, seq.

⁵ Cujac. lib. 20, obs. 5; Puf. tom. 3, obs. 157; Wernher, tom. 2, pt. 10; Struv. Ex. 40, Th. 16; Lauterbach Coll. Theor. pr. h. t. § 53.

⁶ Paul. re Jud. P. 42, 1, 19, § 1.

⁷ P. 39, 5, 18, pr.

Donor does not guarantee title.

good title, or to warrant these sorts of gifts,¹ therefore the donee may incur great expenses concerning them, and may yet be evicted; an action will, however, lie, if design or deceit be proved against the donor.

§ 1067.

Actions arising out of gifts *inter vivos*.

The donatarius or donee, *inter vivos*, can institute the *actio ex stipulatu*, when the gift was made solemnly *per stipulationem*;² but if no such solemn form were used, he must have recourse to the *condictio ex lege*, or remedy by statute.³

§ 1068.

Gifts in England, when valid.

In England, gifts absolutely made are valid and binding where either actual possession has been delivered when the object is capable of delivery, or, in case of incorporeal hereditaments, and of such estate whereof actual possession cannot be had, where the gift has been ratified by deed or promissory note, which the grantee or maker thereof cannot rescind, being estopped by his own deed, it being implied by law that no man would thoughtlessly, or without due consideration, enter into so solemn an engagement, which therefore carries with it an internal evidence of a good consideration, subject to the two statutory enactments⁴ for the protection of the Crown and of creditors.

Not rescinded by a subsequent will.

A gift by deed cannot be rescinded by a subsequent will, for that is no deed; moreover, the property passed and vested on execution and delivery of the deed, which is the constructive delivery of the object; the possession, therefore, is lost, and could only be recovered as in any other case.

Of incorporeal hereditaments.

Grants, concessiones, are also the regular mode of transferring the property of *incorporeal hereditaments* by common law, or such things whereof no corporeal livery can be had;⁵ hence all corporeal hereditaments are said to lie in *livery*; and others, as advowsons, commons, rents, reversions, &c., to lie in *grant*;⁶ for which, Bracton⁷ gives the following reason,—*traditio nihil aliud est quum rei corporalis de personâ in personam, de manu in manum, translatio aut in possessionem inductio; sed res incorporeales, quæ sunt ipsum jus rei vel corpori inhærens, traditionem non patiuntur*. These, therefore, pass by mere delivery of the deed.

§ 1069.

Requisites of the *donatio mortis causa*.

The requisites of the *donatio mortis causâ*, which, it has been observed, is a middle thing between a gift and a legacy, is generally regulated by the same laws as last wills; hence, whosoever would make a gift in contemplation of death, must be also capable

¹ P. 39, 5, 18, § 3.

² C. 8, 54, 35, § 5.

³ C. ut supra.

⁴ 3 Hen. VII. 4; 13 Eliz. 5.

⁵ Co. Litt. 9.

⁶ Ibid.

⁷ Bract. l. 2, c. 18.

of making a testament; and there are persons who, although they have the free disposal of their property, have not the *testamentifactio*, such as the apostates from the Christian religion, these can make no *donatio mortis causa*; and Ulpian¹ says, *qui habent castrense peculium, vel quasi castrense in ea conditione sunt, ut donare et mortis causâ et non mortis causâ possint quum testamenti factionem habeant*. A deaf and dumb person may make a contract, though he cannot make a gift, *mortis causa*.² But a *filius familias* cannot make a testament, though he can make such gift with his father's concurrence—*tam is, qui testamentam facit, quam qui non facit mortis causa donare potest*. *Filius familias qui non potest facere testamentum, nec voluntate patris, tamen mortis causâ donare, patre permittente potest*,³ this applies to the *peculium profectitum*; but it is no will because it takes effect not from its date, but from the moment of the death; but if the father die first, the son becomes *sui juris*, and may make a *donatio m. c.* or a testament without inconvenience. Sed quære, can the father revoke such a gift made with his consent?⁴

The donor must have the testamentifactio. Exceptions, apostates. The castrense peculium.

The filius familias.

§ 1070.

Donatio m. c. must be done in the presence of five witnesses present together at the same time,⁵ as in the case of last wills, where a direct heir is not named; thus much then regards the donor.

Form of gifts mortis causa.

As regards the donee, none can receive a gift in contemplation of death who would not take under a will.⁶

Rights of the donee, incapacitated to take under a will. Man and wife.

As a testament is revocable at any moment, so is a *donatio m. c.*; hence man and wife can make these gifts—hence they are exempt from registration—hence a minor can effect them without the consent of his curator.⁷ The necessity of the donee surviving the donor applies in these gifts equally as in the case of testaments.

Donee must survive.

The *donatio mortis causa*⁸ has also some conditions common with contracts, and differs from a testament in requiring a mutuality of consent in the donor and donee; or, in other words, it must be accepted⁹ in the life of the donor. There is, however, an exception in the case of a donor making a gift, and it not being possible to prove that the donor expected or applied for his consent; the¹⁰ disposition will be good as a legacy of trust estate, in so far as it is in other respects legal as to the object and parties.

How this gift resembles a testament.

Consent of donee.

¹ P. 39, 5, 7, § 6.

² C. 6, 22, 10.

³ Marcian, P. 39, 6, 25; Voorda Interp. lib. 3, c. 19; but Lauterbach Diss. cit. Th. 21, 2, and Cocceii Jur. Contr. tit. de m. c. don. qu. 2, holds the *testamenti factio* not to be necessary; *sed dubitandum est*.

⁴ Vinn. I. 2, 12, pr. n. 3.

⁵ C. 8, 57, 4; Cocceii in Jur. Contr. tit. de m. c. don. qu. 4.

⁶ For these persons, vide those incapacitated from taking under testaments.

⁷ Cocceii in Jur. Contr. tit. du m. c. don. qu. 4.

⁸ P. 39, 6, 38; P. 30, 2, 75 & 77, § 26; C. 8, 57, 4.

⁹ P. ibid. & 39, 6, 28.

Gift can be made absolute by consent. Does not depend on the testament.

The donor can legally engage not to revoke, which he could not do as regards a testament according to Roman law; such a gift resembles the *post obit* deed in England. The validity of *donationis m. c.* does not depend in any respect on the administration of the estate; for if no administration take place, legacies are lost, but the *donationis m. c.* is not so.

If the donee have the capacity to accept when the donor dies, it is sufficient; but in legacies, he must have the necessary capacity at the time of the making of the will.

§ 1071.

Requisites of a *donatio mortis causa* is an improper gift.

In case of a *donatio mortis causâ* the intention¹ must be expressed in the gift, or by other words, so that it may not appear an absolute and proper gift, for then he would rather live and retain it himself;² as, that the donor is sick, about to travel, or engage in war, or at a time of epidemic or general pestilence, or on account of the general frailty of human nature. A gift of this description is conditional, and becomes *ipso facto* void; and if the donor escape the supposed danger, or if he repent of the grant,³ or if the donee *in spe* die before him,⁴ or the delivery be deferred till after the donor's death:—In other respects, this sort of gift is subject to the same rules as the *donatio inter vivos*; it must be made in the presence of the parties, by messengers or letters, and accepted by the donee.⁵

Lastly, as before observed, those⁶ are also improper gifts which are made for other good causes, or upon condition, or *sub modo*, that is, with a certain duty annexed to them.

§ 1072.

The points in which *donationes m. c.* resemble legacies.

The difference between a *donatio mortis causa* and a *legatum* may be summed up as follows:—

The *similarity* consists chiefly in the eight following points:—

1. That to every deed, except a testament, five witnesses are required;⁷ also in *donatio mortis causa*.⁸

2. That the donor can recall during life; and that it does not come into operation till after his death.⁹

3. That it vests in the donee immediately on the death of the donor, if not before delivered.¹⁰

4. That, as one person failing another can be substituted by the *legatarius*, can he be so by the *donatarius*?¹¹

5. That this gift is like a legacy restrained by the Falcidian law.¹²

6. That it has the *jus accrescendi* among those joined in the same thing, takes place also in this case.¹³

¹ P. 39, 6, 2, et seq.

² P. 39, 6, 1.

³ P. 39, 6, 29 & 30.

⁴ P. 39, 6, 2.

⁵ P. 39, 6, 27, 35 & 2.

⁶ P. 39, 5, 3.

⁷ C. 6, 36, 8, 3.

⁸ C. 8, 57, 4.

⁹ P. 39, 6, 29 & 32.

¹⁰ P. 6, 2, 2.

¹¹ C. 8, 57, 1.

¹² I. 2, 22; C. 6, 50, 1.

¹³ P. 30, 1, 16; C. 6, 51, 14.

7. That a wife or husband can leave or give mortis causa to a wife or husband.¹

8. That in both there is no necessity for registration.

The *dissimilarity* consists in the following points:—

1. That donatio mortis causâ is confirmed by the death of the party, and does not, like a legacy, depend on the succession to the inheritance. Points in which they differ.

2. That a gift is extinguished by the death of the donee before that of the donor, whereas a legacy would go to the donee's heirs.

3. That in legacies the date of the will is regarded, but in donations the period of the donor's death.²

4. That in legacies the will of the testator suffices alone, but a gift is not perfect without acceptance.³

Upon the whole, however, we may look upon these as distinctions without practical difference.

§ 1073.

The same actions are available by a donee as by a legatee, *rei vindicatio*, *actio hypothecaria*, and *actio personalis, ex testamento*; but this latter, only in cases where the gift is also mentioned in the testament. Actions competent to the donee.

§ 1074.

The gift which in ENGLAND the most nearly resembles the donatio mortis causâ of the Romans, is when a person in his last sickness *actually delivers* to a donee who retains continuous possession any personal chattel, or in case of choses in action the instrument secures it to be kept in case of decease, and when these events take place the consent of the executor is not required; but in the latter case he must even put the security in suit for the benefit of the donee, for the gift has, in fact, been made *inter vivos conditione mortis*, that is, a deposit till such event should take place, when it was to vest absolutely; this, however, cannot be made available against creditors, or against the donor, should he recover, being accompanied with an implied trust;⁴ nay, this gift may be made between married persons, though it cannot be done in the ordinary way. Parallel as to England.

§ 1075.

The institutes⁵ sufficiently set forth what a *donatio propter nuptias* is, and gifts between man and wife being invalid except in certain cases, such as *mortis causâ* and in the manumission of slaves; which provision, Antoninus⁶ confirmed by his constitution, although he allowed a wife to make a gift to her husband Donatio inter vetum et uxorem, when practicable.

¹ P. 24, 1, 9.

² P. 39, 6, 22.

³ P. 39, 6, 38.

⁴ M. and W. 401.

⁵ l. 2, 7, § 3.

⁶ P. 24, 1, 42.

to enable him to accept the senatorial or equestrian¹ dignity from the emperor.²

These regulations were adopted in order to prevent married persons ruining each other mutually, by rendering the property of the one party only what was intended to be common,³ and must, therefore, be understood of gifts made during coverture.

Originally, while the *conventio in manum* subsisted, there was a unity of person between the wife and husband; hence, inasmuch as whatever the wife had belonged to the husband, so she could make no gift; but when this practice became obsolete, as has been before seen, and the wife had a separate estate, these regulations became necessary.

§ 1076.

Donatio propter nuptias.

*Donatio propter nuptias*⁴ was formerly called *ante nuptias*, because it could only be made before marriage were made by either party under the implied condition,⁵ that if the marriage did not take place without the fault of the donor the gift was to be returned.

When either party dies before marriage solemnized, they were returnable. Exception.

If the death⁶ of either party ensued before marriage, when the woman was the donor, the whole was to be returned; but if the man were the donor the whole was to be returned to him or his heir, if he had not kissed the woman; but if so, then half only,—a kiss being looked upon as a sort of consummation, and a woman esteemed immodest that suffered it on any other account.

Were, however, irrevocable.

Donationes propter nuptias were, however, irrevocable previous to the constitution of Constantine,⁷ whether marriage followed or not, as much as those proceeding from mere liberality,⁸ unless there were an express condition to return them.

Dote and anti-dote.

The gift *propter nuptias* might be made and increased during the coverture, as the *dos* given by the father of the woman or some in that line,⁹ whether *profectitia* or *adventitia*. Nor does this interfere with the *Sctum*. that forbade gifts to pass between husband and wife: the condition annexed to this gift is, that as the portion remains with the husband, so this gift is to remain with the wife. She has not, however, the interest or profits thereof as the husband has of her portion, for he alone undergoes the extraordinary charge marriage involves;¹⁰ the interest of the wife, then, in this gift is no farther than to keep it as a security, that her portion shall be returned if the marriage be dissolved; all his estate is, nevertheless, answerable for it; this, however, gives additional security. If the estate of the husband consist of immoveables,¹¹ it cannot be alienated or mortgaged by him even

¹ Gaius, P. 24, 1, 42; vide ibid. 2.

² Ulp. Frag. 8, 1; Paul. R. S. 2, 23.

³ Plut. Qu. Rom. 7.

⁴ I. 2, 7, 3.

⁵ C. 5, 3, 15.

⁶ C. 5, 3, 16.

⁷ C. 5, 3, 8, et seq.

⁸ C. 5, 3, 2.

⁹ P. 23, 3, 5, 9 & 11.

¹⁰ C. 5, 12, 29 & 30.

¹¹ Nov. 61.

with¹ his wife's consent, except in cases of necessity or exchange.² This settlement, as well as the first,³ must in quantity and quality be equal to the portion; the portions of women being very much protected by law⁴ in *ambiguis pro dotibus respondere melius est*,⁵ to encourage them to marry *reipublicæ interest ut mulieres dotes salvas habere propter quas nubere possunt*; ⁶ hence an action lies for the portion on a bare promise after solemnization.⁷

In other words, as the wife's property is the *dote*, the *donatio propter nuptias* is the *antedote* in a legal, not in a medical sense.

§ 1077.

The *donatio propter nuptias* is sometimes termed a jointure, but it was not so in fact,—the wife brought her *dos* to the husband, who was under the obligation of returning it if certain occurrences took place: as security for this he made a *donatio propter nuptias*, or in contemplation of marriage to the wife; thus, if he was unable when the case occurred to return the *dos*, there was ample indemnity in the *donatio propter nuptias*. Before Justinian, this security was termed *donatio ante nuptias*, because it must be effected before marriage contracted, for the reason above assigned; but Justinian, by his constitution, enabled it to be effected also *after* marriage, in the manner of a post-nuptial settlement. Thus Justinian directed it to be termed *donatio propter*, or “on account of,” which embraced both.⁸

Donatio propter nuptias.

Ante nuptias.

§ 1078.

Gifts, then, between man and wife during coverture were not entirely valid;⁹ formerly they were utterly void.¹⁰ Under Severus and Caracalla they were made in so far valid, that the heir of the donor could not recall them after the death of such donor who has not done so;¹¹ but the gift is merely in possession during the life of the donor,¹² although it becomes valid by his death. As long as the donee lived, he had a possession *de facto*;¹³ but this usucapion confers no valid title against third parties,¹⁴ and the donee must return the object and its accessories, except interest and *fructus industriales*;¹⁵ and if it be in existence, it can be vindicated in the hands of a third party,¹⁶ otherwise there is no remedy beyond a personal action, which, as a rule, only lies for the return of that whereby the possessor is enriched.¹⁷ The donor, however, who

Gifts between man and wife, when valid.

¹ I. 2, 8, pr.

² P. 23, 3, 26 & 27.

³ Nov. 97.

⁴ P. 23, 3, 2 & 70.

⁵ P. 50, 17, 85.

⁶ P. 23, 3, 2.

⁷ C. 5, 11, 6.

⁸ C. 5, 3, 20, Anth. § 1.

⁹ P. 24, 1, 32, § 2; Richter de Orat. D. Ant. de Don. inter V. et U. confirmandis.

¹⁰ P. 24, 1, 3, § 10; C. 5, 16, 10; Menken de Don. Inst. V. et U. non ipso jur. nullis.

¹¹ C. 5, 16, 25.

¹² P. 41, 2, 1, § 4 & 16; P. 5, 3, 13, § 1; P. 43, 16, 1, § 9—10.

¹³ P. 41, 6, 1, § 2.

¹⁴ P. 24, 1, 15, § 1; & 16, 17 & 21, § 1; P. 22, 1, 45; C. 5, 19; Nov. 22, 59; Voet. L. 24, t. 1, § 3.

¹⁵ P. 24, 1, 31, § 2; P. 6, 1, 27, § 5.

¹⁶ P. 24, 1, 31, § 2; P. 6, 1, 27, § 5.

¹⁷ P. 24, 1, 5, § 18; & 6, 7, pr. § 1—5; & 16, 29, 33, § 1; & 37, 39, 50, § 1; & 55.

obtains the return of the object, cannot demand the profits thereof,¹ nor vindicate what has been bought with the money given,² although he can, in case of bankruptcy, obtain the severance thereof, *jure separationis*, from the estate.

Persons putatively married are treated as if really so.

Interference of the Fiscus.

In what cases there was a prohibition. Mixed transactions.

The new *Senatus Consultum* applies to gifts between married people, but putatively married persons have the same privileges. A marriage known to be null and void, but continuing, creates no greater hindrance in this respect than a real marriage or betrothal, although the *Fiscus*³ will sometimes deprive the receiver of the gift as infamous; moreover, all members of the family of the married persons connected by unity of person, are placed on an equal footing with the parties themselves.⁴

The law applies to no other transactions⁵ than gifts, and what so serves as a cover for them.⁶

If the transaction be mixed, the gift is void;⁷ nevertheless, the gift will stand good, if it be not severable from other transactions between the husband and wife,⁸ although it is without retrospective operation.⁹ This revival, however, only extends to precluding the heir from demanding the object back from the donee, but not to the right to receive back a gift merely promised.¹⁰

But if the donor has expressly or impliedly revoked the gift by pledging¹¹ or selling it, the heir can demand it back;¹² and it must be presumed that, in case of the bankruptcy of the donor, the creditors could question the gift if the meeting took place before, but not if it took place after his death.¹³ The *Fiscus* cannot question an unrecalled gift of a deceased donor.¹⁴

The presumption in cases of doubt is, that an object given has been donated, and according to the *præsumptio muciana*, that whatever the wife possesses proceeds from the property of the husband.¹⁵

§ 1079.

In how far the gift is valid.

The donation may become invalid by law, it depends, however, upon accident whether it become so or not; if the donee die first, it is invalid;¹⁶ but if the donor do not die after the donee, which, if both perish by the same accident, must be presumed,¹⁷

¹ P. 24, 1, 28, § 3.

² Id. 55.

³ P. 24, 1, 3, § 1; & 5, pr.; & 32, § 27, 28, 35, 64, 65.

⁴ P. 24, 1, 3, § 1-7; Id. 32, § 16; Glück. Pand. 25, B. S. 458-64, 26; S. 1-8, 83-86, 124-139.

⁵ C. 5, 16, 9; C. 5, 15, 13.

⁶ P. 24, 1, 5, § 5-7, § 6-32, § 24 & 49.

⁷ P. 24, 1, 31, § 3.

⁸ P. 24, 1, 5, § 2.

⁹ C. 5, 16, 25.

¹⁰ P. 24, 1, 23; Id. 32, § 2; P. 24, 1, 33, § 2; C. 5, 15, 2; Frag. Vat. § 292; C. 8, 54, 35, § 5; Nov. 162, 1; Vinn. Qu. Sel. L. 2, 15; Voet. L. 24, t. § 5;

Glück. P. 25, B. S. 430-6, 26, B. S. 104-122; Bynkershoek Obs. L. 5, c. 18.

¹¹ C. 5, 16, 32, § 3, 5; Gentili, l. c. cap. 13, 14, 15. As to the pledging, Nov. 162, 1, § 1; Lauterbach Coll. L. 24, t. 1, § 13.

¹² P. 24, 1, 32, § 4.

¹³ Schweppe Concurproc. § 53-57; Kori Concurproc. § 44; Leyser Spec. 312, m. 9.

¹⁴ C. 5, 16, 1.

¹⁵ C. 5, 16, 6; P. 24, 1, 51, Glück. P. 26, B. S. 216-20.

¹⁶ C. 5, 16, 6 & 25; P. 41, 6, 1, § 18.

¹⁷ P. 24, 1, 32, § 14.

the gift is valid up to five hundred aurei, and above if duly registered; if, on the contrary, neither of these occurrences take place, the gift can be made valid by testament.

§ 1080.

Donation between man and wife is valid when the donee is not richer thereby, as in all cases where the gift is not for the benefit of the donee, but of a third party, or where it does not absolutely increase the property of the donee, as in the case of the gift of a place of sepulture.¹ When the donor himself profits by the gift, as in the case of anything given for the common benefit,—as for the house-keeping, or for the advancement of the dignity of the husband,² or where the donor is not poorer thereby, it is valid. Presents in return cannot be set off the one against the other, even though they be consumed; and an exception lies against the heirs of the consumers.³ But the donor is not to be looked upon as poorer if he give something to his wife which belongs to another (*res aliena*); the usucapion will be in her, for the property was never his: when he gives away a profit which had been offered to him,⁴ as, for instance, if the husband repudiate an inheritance which will ultimately devolve upon the wife as heir, or restore by will what was given; for in the first case, he was never possessed; in the second, the property is not altered.

Donation between man and wife is valid when the donee is not enriched,

or when the donor is not impoverished thereby.

Other cases in which donation between man and wife is permitted. The repudiated inheritance.

And by analogy, when the husband pays a debt before due, or waives a pledge.⁵

Debt paid before due.

When the gift is legally necessary, as when it contributes simply to the support and comfort of the donee, as a moderate quantity of fruits, labor of slaves,⁶ &c.

Necessary gifts.

When the gift consists of trifles commonly given as mere tokens of affection.⁷

Trifles.

When destined to the repair of a building,⁸ or when given by the sovereign.⁹

For the repair of a building.

When the gift is remuneratory, or when confirmed by oath,¹⁰ or when it be given *mortis causa*, or on the dissolution of the coverture.¹¹

Remuneratory gifts, and those on oath. *Mortis causa*.

§ 1081.

When the *dos* was deposited the day previous to the marriage ceremony in the hands of the *auspices* in trust to be delivered the next day to the husband,¹² it was said to be given *dari*; Juvenal alludes to the *datio dotis*, thus:—

Original solemnities attending the *dos*. *Dos datur*.

¹ P. 24, 1, 5, § 8; Id. 8, 12, 9, pr. 34 & 49.

² P. 24, 1, 31, § 10; Id. 40, 41, 42.

³ P. 24, 1, 7, § 2 & 32, § 9 & 25; Glück. P. 26, B. S. 30-49.

⁴ P. 24, 1, 5, § 13, 15.

⁵ P. 20, 6, 31, § 6.

⁶ P. 24, 1, 17, 21, 28.

⁷ P. 24, 1, 7, § 1 & 31, § 8, 9.

⁸ P. 24, 1, 14.

⁹ C. 5, 16, 26.

¹⁰ Du Roi de Donat. Conjug. Remunerat. absque insin. Val. Contra. Voet. L. 24, T. 1, § 10.

¹¹ X. 2, 24, 28; Glück. P. 26, B. S. 203-5; Gail. L. 2, obs. 40, n. 5; Titler D. de Quæst. an Donat. Int. V. et U. facta iuramento accidente sit valida Lips. 1777.

¹² Suet. Claud. 26.

* * * * * *Dudum sedet illa parato.*
Flammeolo, Tyriusque palam genialis in hortis
Sternitur et ritu decies contena dabuntur
*Antiquo, veniet cum signatoribus auspex.*¹

Promittitur. The *dos* might be promised by the intervention of a stipulation, *persona interrogata responderet et stipulato promitteret.*²

LY.—*Sponden', ergo tuam gnatam uxorem mihi?*

CA.—*Spondeo et mille auri Philippum dotis.*

* * * * *

CH.—*Istac lege (cum ista dote) filiam tuam sponden' mihi uxorem dare?*

CA.—*Spondeo.* CH.—*Et ego spondeo idem hoc.*³

The *dos* was usually paid at three terms,—either annually, biennially, or triennially.⁴

Sive dicitur. *Dictio* dotis differs from *datio dotis*, which, although performed by solemn words, was performed without the interrogation, and without stipulation.⁵

CH.— *Dos, pamphili est,*
*Talenta quindecim PA accipio.*⁶

Difference between *datio* and *dictio* dotis. The *dictio* could only be performed by the woman herself, with the consent of her tutor,⁷ her debtor, her father, or any virile ascendent, and was termed *profectitia*; but the *datio*, by any one whatsoever, though not a relation,⁸ and was termed *adventitia*.

Dos *profectitia* is from the father. Both these came to the husband; but when the *conventio in manum* ceased to be the common practice of the Roman State, a distinction began to obtain; the *profectitia* returned to the husband when the wife died in coverture, whether she was a *filia familias* or *sui juris*,⁹ except the father died first, when the whole was acquired by the husband; but if the wife died before, the husband retained a fifth.¹⁰ The *adventitia*, however, remained the property of the husband; if, however, the donor had stipulated for its return, it was termed *receptitia*, and so in effect resembled the *profectitia*, except in that it came from a stranger.¹¹

Don *adventitia* from a stranger. If the *dos* be given of free will, it is termed *voluntaria*; but if by the operation of the law, *necessaria*,¹² and may consist in every sort of property;¹³ nay, even of the whole property of the wife,

¹ Juv. Sat. 10, 333.

² Caius, In. 2, 9, 1.

³ Plaut. Trinum. 5, 2, 34.

⁴ Cic. Ep. ad Att. 11, 4, 23, et ult.

⁵ Cujac. ad Ulp. Fr. 6; Brisson. de Form. 6, p. 543.

⁶ Ter. And. 5, 4, 47; Sidon. Apollin. Epist. 1, 11; P. 23, 3, 2; Id. 44, § 1; Id. 46, 1; Id. 57, 59.

⁷ Cic. pro Flacc. 34-5; Ulp. Fr. 11, 20.

⁸ Ulp. Fr. 6, 2; Paulus P. 23, 3, 415; Cic. l. c. 25; Ulp. Fr. 11, 27; Lauterbach Coll. L. 23, t. 3, § 24.

⁹ P. 24, 3, 59.

¹⁰ Ulp. Fr. 6, 4.

¹¹ P. 23, 3, 5, § 11; C. 5, 13, 1, § 1; v. Tigerström, l. c. 1 B. S. 45-7.

¹² P. 39, 6, 31, § 2; Leyser Spéc. 302, m. 16; Hofmann de Dot. recep. Alt. 1718.

¹³ P. 23, 3, 6, § 1; Id. 7, § 3 & 21; Id. 34 & 42-3 pr.; Id. 66 & 81; C. 5, 12, 12; Breuning an Uusufr. in Dot. dar. poss. Lips. 1771; Id. de Nom. in Dot. Dat.; Id. an in Dot. nomen. dar. poss.; Id. quid intersit inter Fund. et Usumfr. Fund. in Dot. dat. Lips. 1774.

though only *titulo singulari*,¹ to the extent that he who gives the *dos* has the right, or is empowered, to transfer it to another.

All property of the wife must be generally either *dos* or *paraphernalia*, which is ascertainable by circumstances only, inasmuch as every marriage supposes a *dos*; it may be settled tacitly before marriage, the marriage being the consideration for it.

§ 1082.

The meaning attached to the word *dos*, by Bracton and other English lawyers, is the reverse of the sense in which the Roman jurists used it, among whom it signified the portion brought by the *wife* to the husband; a practice founded, indeed, upon the ancient ceremony of coemption. Tacitus² states that it was the custom among the Germans for the wife not to bring her husband any fortune, but for the bride to receive from her bridegroom, *dotem non uxor marito sed uxori maritus affert*, which led to the presumption that the custom of dower at common law was rather of Saxon than Roman origin, although Blackstone, quoting Wilkins,³ says, that dower out of lands was unknown in the ancient Saxon constitution, it being provided by the laws of King Edmond that the wife should be supported entirely out of the personal estate; neither can he trace it to the Normans, not being a part of the pure and ample law of feods, but first introduced into that system by Frederick the Second, cotemporary of Henry the Third, whence his inference is that the *triens*, *tertia datalitium*, or practice of granting dower out of lands, is rather of Danish origin; indeed, it is said to have been introduced into Denmark by Swein, father of Canute, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals.

One may, however, still be inclined to doubt this; for by the gavel kind tenure, which was undoubtedly of Saxon origin, and the law of the whole of England before the Norman invasion, the widow became entitled to a conditional estate in one half of the lands, provided she remained chaste and unmarried, the object being evidently the same as at present, her sustenance and the education of the younger children.

With respect to the system, as mentioned by Tacitus, of the husbands buying their wives, and the Romans originally having practised a similar system, originating, it is supposed, in the rape of the Sabines, reduced the contract of marriage to the law of other contracts, by bargain and sale, and it is curious that the supposed legality of a Smithfield marriage has been prevalent among the lower orders, and is so to this day; that is, selling a wife for a nominal⁴ sum in market.

The word *dos*, in England, is what the husband gives the wife.

Origin of this endowment by the wife, Saxon;

out of lands Danish;

or by gavel kind, Saxon.

¹ P. 23, 3, 62; C. 5, 12, 4; C. 8, 17, 9; Hasse S. 379, 382; v. Tigerström Dotalsr. 1, B. S. 169-71.

² De Mor. 19.

³ 75.

⁴ Vide 559, h. op.

§ 1083.

How endow-
ments were
made in Eng-
land by parti-
cular custom.

The manner in which a woman may be endowed at common law is fivefold :—

By *particular custom*,¹ as that a wife should have half the husband's lands, in some places the whole, and in some only a quarter.

De la plus belle.
Ad ostium
ecclesie.

De la plus belle was abolished with military tenures.

*Ad ostium ecclesie*² was where the tenant in fee simple of full age, openly at the church door, where all marriages were formerly made, after affiancal made—and Sir Edward Coke adds, and troth plighted, endowed his wife specifically with the whole or such part of his lands as he pleased ; the wife at her husband's death might enter on these without further ceremony.

Ex assensu
patris.

*Ex assensu patris*³ was the same as the foregoing, made during the life, and with the consent of the father ; this has been abolished by statute.⁴

The dos ration-
abilis.

By *common law*, or *dos rationabilis*, was the third part of the lands of which the husband was seized at the time of the marriage, and of no other, except a special accord was made before the priest at the time of the marriage to endow her with future acquisitions ;⁵ but if the husband at the time of the marriage had no lands, an endowment in goods, chattels, or money was a bar to any dower⁶ of lands thereafter acquired ; as to this third part, it is confirmed by the Charter of 1217 and 1224. Littleton, however, laid it down in the time of Edward the Fourth, that a wife may repudiate such dower, and betake herself to her dower at common law.

§ 1084.

Dower by join-
ture.

The most usual ways now of endowing a wife is *jointure*, which, strictly speaking, is a joint estate, and in so far resembles the Roman practice, as it is limited to both wife and husband, but in common acceptance extends also to a sole estate, limited to the wife only, defined by Coke as “a competent livelihood of freedom for the wife of lands and tenements, to take effect in profit or possession, presently after the death of the husband, for the life of the wife at least,” a description framed on the statute of Uses,⁷ before which the greater part of the property in the country was conveyed to Uses, the estate being in one man and the profits in another ; hence the husband not being *seized*, the wife had no claim to dower, wherefore the statute gave such use the same effect as seisin, but to prevent the wife becoming entitled to dower out of any special lands in addition to those held to the

¹ Litt. § 37.

² Litt. § 39.

³ Litt. § 40.

⁴ 3 & 4 W. IV. 105, 13.

⁵ Glanvil. de Questu Suo.

⁶ Glanvil. 2.

⁷ Hen. VIII. 10.

husband's use, wherefore the statute provided that the making such estate in jointure to the wife before marriage should for ever bar her dower, but four requisites must be observed :—

Its four
requisites.

1. That the jointure take effect immediately on the husband's death.

2. That it be for her *own* life at least, not *pur autre vie*, term of years, or other smaller estate.

3. That it be made to herself, and to no other in trust for her.

4. That it be expressed by deed to be her whole dower, and not a part only thereof.

And, in case of a bad title by fraud, she could revert to her dower at common law.

§ 1085.

The wife may be endowed of all lands, tenements, and hereditaments, of which her husband was seized in fee simple or tail at any time during the coverture, and of which any issue she might have had could by any possibility have become heir;¹ thus, a second wife may be endowed, for the issue by the first may fail; moreover, a seizin in law of the husband will be as effectual as a seizin in deed, in order to render the wife dowable.²

With what a
wife may be
endowed.

One exception exists to a castle maintained for the necessary defence of the realm, for that ought not to be divided, and the public ought to be preferred to private interest;³ in such case, therefore, the wife's title does not attach.

§ 1086.

With respect, then, to *real property*, the husband is entitled by the law of England to the profits and sole control of all freeholds of which the wife is seized at the time of her marriage, or which may subsequently accrue to her during coverture, but the freehold itself is vested in both; the continuance of the husband's interest therein, however, limits his power of conveying away or charging the same for a longer period than the duration of such interest, even with his wife's concurrence, she in law being incapable of giving consent to any such proceeding. To remedy the indirect and fictitious modes by which the rigor of the law was wont to be evaded by levying fines, &c., a statute was introduced,⁴ enabling a married woman to alien her real estate by simple deed, freely given, in which the husband, generally speaking, must concur, as though she were a feme sole.

In England the
husband has the
sole administra-
tion of all free-
hold of the
wife.

Although the husband cannot grant leases of his wife's land, even though she be a party, binding on her and her heirs after the determination of her interest by common law, yet by statute⁵ it may be done.

¹ Litt. 36, 53; 3 & 4 W. IV. 105, 2.

² 3 & 4 W. IV. 109, 3.

³ Co. Litt. 316.

⁴ 3 & 4 W. IV. c. 74.

⁵ 32 Hen. VIII. 28.

§ 1087.

Presumption of ownership in favour of the husband.

Presumption muciana. Dos differs from bona parapherna.

The dos does not lapse to a third party.

Everything which is found in the house of the husband, or possession of the wife, by virtue of the *præsumptio muciana* belongs to him, or is acquired by him.¹

The *dos*² differs from the *bona parapherna*,³ but these are termed *paraphernalia* in the narrower sense, when the wife gives the husband rights upon them, though not for the purposes of marriage; if, however, she retains all her rights, they are *bona receptitia*.⁴ Objects which belonged to the portion in a former marriage, continue so in the second when the marriage is concluded between the same parties without sign of a change of intention, and the *dos* does not lapse to a third party,⁵ for otherwise the presumption⁶ is not in favor of the dotation, whether acquired at or after the conclusion of the marriage;⁷ nevertheless, no distinct mention is exactly necessary, since a *dos* can be tacitly made.⁸

§ 1088.

Certain persons are legally liable to grant the dos.

Exemptions in certain cases.

A legal liability to grant a *dos* attaches on the legitimate father, and on the legitimate paternal male ascendants,⁹ be a daughter issue of the body under power or not,¹⁰ before or after the conclusion of the marriage; the father is, however, held not to be liable in cases where the daughter has deserved disinheritance,¹¹ or marries against her father's will under circumstances which justify his withholding his consent,¹² or where she has a property sufficiently considerable to make her own *dos*,¹³—but in this last case, if the father grant the *dos*, it is presumed that he grants it out of his own property.¹⁴

The mother, however, is only excused from granting a *dos* for weighty reasons,¹⁵ many of which extend to maternal ascendants.¹⁶

¹ P. 24, 1, 51; C. 5, 16, 6; Leyser de Præsump. Muciana, Viteb. 1748; Glück. P. 26, B. S. 216-20; Eisenhard de R. I. quod in casu dub. omnia bona mariti esse præsumenda sint caute adhibenda, Helmst. 1771; contra, Voet. L. 24; P. 1, § 16.

² P. 23, 3, 7, pr. & 56, § 1 & 76; C. 5, 12, 20; v. Tigerström das Rom. Dot. recht, Berlin, 1831-2; 2 B. S. Hasse Guterrecht der Ehegatten nach, R. R. 1 B. Bon. 1824; Goddæus tr. de Jur. Dot. Marb. 1594; Finestres de Mon. salvo de eod. Arg. Cervar. 1754; Wordenhoff de Jur. Dot. Bas. 1648; Muscov. elect. dot. Gött. 1739; Geyert de Jur. Oblig. circ. Dot. Goet. 1785.

³ C. 5, 14, 8 & 11; ab Eyben de Jur. Paraph. Op., P. 2.

⁴ P. 23, 3, 9, § 3; C. 5, 14, 8, 11; Grupen de Uxore Rom. cap. 7, § 7.

⁵ P. 23, 3, 13; Id. 30; Id. 40; Id. 63; Id. 68; Id. 69; P. 23, 4, 29, § 1; P. 24, 3, 66, § 5; Hasse S. 452-474; contra, Schroeder de dote in secundo mat. tacite renovata, Jen. 1723.

⁶ C. 5, 12, 4; P. 23, 3, 9, § 2, 3;

Hasse a. a. O. S. 412-52; Bauer Bona Uxor. Paraph. esse præsumenda, Lips. 1792; contra, Miester de Bon. Ux. ex J. R. præsumpt. non paraph. sed dot. Goett. 1769; Müller ad Leyser, obs. 532-3; Glück. P. 25, B. S. 220, 46.

⁷ Leyser Sp. 302, m. 5-6.

⁸ P. 23, 3, 48, § 1.

⁹ P. 23, 2, 19; C. 5, 11, 7; contra, Wernher, P. 5, obs. 127; Leyser Sp. 303, m. n. Müller ad Leyser, obs. 540.

¹⁰ C. 511; alt. Voet. L. 23, t. 3, § 12; contra, Hofacker princ. T. 1, § 420; Hasse S. 346-52; Glück. P. 25, B. S. 62-9, adoptive father; P. 23, 3, 5, § 13.

¹¹ Contra, Leyser Sp. 303, m. n.

¹² Lauterbach Coll. L. 23, t. 3, § 14, 15; Breuning de Dot. Filiæ quæ cit. pat. cons. nup. Lips. 1767.

¹³ L. Ult. C. Cit. Müller, obs. 540; Glück. l. c. 69-76.

¹⁴ C. 5, 11, 7; Puf. T. 3, obs. 150; contra, Voet. L. 23, t. 3, § 16.

¹⁵ C. 2, 12, 14; C. 1, 5, 19, § 1.

¹⁶ Lauterbach Coll. L. 23, t. 3, § 9.

Legitimate brothers and sisters not being *uterini*, that is, born of the same mother, are held excused.¹

According to the opinion of many, those of the well-doing wife herself,² and the father of an illegitimate daughter, in case of necessity.³

In conclusion, all persons legally liable to grant the *dos* are bound to renew it, if lost without the fault of the wife.⁴ If, however, the right to insist upon the grant of a *dos* has been validly renounced, the whole liability in this respect determines.⁵

When the *dos* is lost, sine culpa uxoris. Renunciatio dotis.

§ 1089.

The promise of the *dos* may be made to the man, to the woman, or to the attorneys of either, but the grant itself can be made to the man alone, to his attorney, or to relations in the ascendent line under whose control he is.⁶

The *dos*, how and to whom to be promised.

If any regulation or contract determine the amount of the *dos*, there can be no question in that respect; but if it be not determined, and the obligation to grant it be *necessaria*, the judge will assess the amount according to the property of the obligee and the station of the married couple, which will supersede a general promise,⁷—but the father's promise is of importance in cases of bankruptcy.⁸ But if a fair and reasonable *dos* only be promised, the judge will still have to assess the amount.⁹

In case of bankruptcy, the father's promise is important.

§ 1090.

The rights of the husband after marriage,¹⁰ and before grant of the *dos*, consist in his right to compel the grant where his claim rests on a promise or a legal right; in the former case by action, and citing the law by which the liability of the obligee is created; thus, in case he sue the father, the *condictio ex lege ult. C. de dot promissione*¹¹ would be the proper form; and, in the case of a promise, an *actio ex stipulatu*,¹² with which can be joined the *actio hypothecaria*.¹³

Grant of *dos*, how legally compellable.

By condictio ex lege,

by actio ex stipulatu, or hypothecaria. As to profits and interest.

As far as regards the profits and interest of the *dos* claimed, a distinction must be drawn in cases where a *dies a quo* for the settlement is fixed, and where not, for in this first case the liability of the father or a third party, when they have promised

¹ P. 26, 7, 12, § 3; Voet. l. c. § 14; contra, Hase S. 358-62; Glück. a. a. O. S. 99-104; v. Tigerström, l. c. 1, B. S. 6, 81-3.

² Leyser Sp. 303, m. 3; Glück. l. c.; v. Tigerström, l. c. 1, B. S. 57, 64, 177-84; Hase, 363-73; P. 12, 6, 32, § 2; exception, C. 9, 13, 1, § 1.

³ Lauterbach, l. c. § 13; sed vide Jacob's de Dot. ante Mat. Consum. Lucr. Jen. 1679, Th. 16.

⁴ Glück. l. c. 78, 94; v. Tigerström, l. c. 1, B. S. 75 & 77; Grass. de Redot. ejusq. Jur. Tub. 1627; Lauterbach, l. c. § 17.

⁵ Bodinus de Renunciacione Dotis facta, Hal. 1709.

⁶ P. 23, 57 & 59, pr.

⁷ P. 23, 3, 60, & 69, § 4; C. 5, 11, 3.

⁸ Puf. T. 1, obs. 66.

⁹ C. 5, 11, 1 & 3; Müller ad Leyser, obs. 541; Glück. P. 25, B. S. 169-180; v. Tigerström, l. c. 1, B. S. 177-86.

¹⁰ P. 2, 14, 4, § 2; P. 23, 3, 21 & 68.

¹¹ C. 5, 11, 7.

¹² C. 5, 11, 4 & 6.

¹³ C. 5, 13, 1, pr. § 1; Hofacker Princ. t. 1, § 430.

the *dos*, and the question was not raised before the expiry of two years after the conclusion of the marriage, only accrues from the end of that time; but where there was no promise, the liability commences from the moment the question is raised;¹ where, however, the *dies a quo* was fixed, the liability dates from that day.

§ 1091.

Rights of the husband and the *dos*.

The husband has certain rights upon the *dos*, because it is property brought to him for the common use of a partnership whereof he is the head, although it is held that it is not liable for the education of children.

The husband is absolute owner, and can freely dispose of the *dos* when it consists of moveables, money, furniture, wearing apparel, and the like; or when it consists in quantity (capital stock), for here, too, the law imposes no limitation.²

The moveables of the wife may be disposed of³ by the husband at his pleasure, so that, after dissolution of the marriage the portion be made good by other things of like value,—the object of this is to avoid those inconveniences which would arise from the husband being restrained from alienating moveable goods, and for the protection of those who might trade with him; thus the portion should be estimated,⁴ and the husband become at once proprietor of and responsible for it.

Right of vindication in the wife.

But, inasmuch as the right possessed by the husband, although complete, is revocable, the wife may vindicate the property as against his creditors,⁵ when she cannot obtain satisfaction otherwise.

Æstimatione facta venditionis causa.

A real sale is presumed when the *dos* has been sold to the husband on valuation, *æstimatione facta venditionis causa*. He may return the object or its value; but the wife in this case, as above, retains her right of vindication. If, however, the object has been valued with the mere view of ascertaining its true worth by way of precaution, so that the wife may possess this proof of the value if the husband be called upon to return it, *æstimatione facta taxationis causa*; no presumption, however, lies in favor of this having been the mode of valuation.⁶

Taxationis causa.

The liability on promissory notes depends on the danger as to how far the husband, where the wife is not the debtor, is liable.⁷

¹ C. 5, 12, 31, § 2; Leyser Sp. 304, m. 5, 7; somewhat otherwise, Hofacker, l. c. Müller ad Leyser, obs. 543.

² C. 7, 8, 1; Vin. ad S. 2, 8, pr.; Cocceii Jur. Con. Tit. de Fund. Dot. qu. 1.

³ P. 23, 3, 42.

⁴ C. 5, 12, 5.

⁵ L. Mencken Diss. de Reb. Extant. Uxor. a Concursu Cred. Separ. Th. 26.

⁶ C. 5, 12, 5, 10, 21; Glück. l. c. 30-33; contra, Leyser Spec. 311, m. 10;

Müller ad ibid. obs. 551; Cocceii, I. C. L. 19, t. 3, qu. 8; Tigerström, l. c. 1, B. S. 138, 50.

⁷ P. 12, 1, 35; P. 23, 3, 33, 36, 41, § 3, 49, 53; P. 23, 4, 6 & 20, § 2; P. 24, 3, 49, pr.; Glück. P. 25, B. 8, 34-39; Schemann's Handb. 2, B. S. 255-8; Hasee ad Culpa, S. 555, 600; Loehr Beyträge zur Theorie der Culpa S. 207, 12; Gottschalk Disc. For. c. 1.

§ 1092.

If the object be not *fungibilis*, or have not passed by bargain and sale, the husband obtains a so-called civil property therein during the coverture, the wife retaining a dormant natural right, ready to revive on dissolution of the marriage;¹ hence the husband administers the property, nor can the wife require security,²—he has the use and usufruct of the object itself and its accessions,³ except a treasure trove,⁴ together with the capacity of defending it by every sort of action,⁵ nay, he can even alienate without the wife's concurrence.⁶

Property of the husband in the dot, the wife's dormant right.

In England, however, *chattels personal* belonging to the wife on her marriage, or subsequently accruing to her during coverture in her own right, and not as an executrix, become the absolute property of the husband. Moreover, in case of *choses in action* due to the wife before marriage, if the husband recover them, be they debts due on bond or otherwise, they vest in him on such recovery and possession obtained: should he, however, die before this be done, or she before possession obtained, her prior title remains unimpaired, and they form part of her estate; in the latter case he becomes, however, owner of such property on administration to her effects, which he is entitled to obtain.

In England property acquired by the wife during coverture vests solely in the husband.

§ 1093.

In respect of immoveables, the husband, like a bridegroom affianced, only has an imperfect title; and, although he derives every profit from the object, he has neither the power of pledging nor selling⁷ under any circumstances, even if the wife consent,⁸ or repeat her consent after lapse of two years,⁹ but the husband cannot question a void sale of this description.

The rights of dotal immoveables with respect to alienation or otherwise.

By the *Lex Julia de adulteriis*, the husband is not permitted to alienate a *fundus dotalis* in Italy, by or against the will of his wife; but, in the provinces, his wife's consent enables him to alienate but not to pledge. An explanation of this paradox has been attempted, by suggesting that it would be easier to obtain the con-

Restrictions of the *Lex Julia de adulteriis*. *Fundus dotalis* in Italy and in the provinces.

¹ I. 2, 8, pr.; P. 23, 5, 13, § 2; P. 23, 3, 75; C. 5, 12, 23, 30; Finestras de Jur. Dot. L. 4, n. 1, seq.; Rebhan Par Limpon. Meirian. p. 165; Hober Digress. 4, c. 9; Hasse S. 238, 59; Burchardi Grunda. d. R. R. S. 139-159; Glück. l. c. 127-48; contra, v. Tigerström Dotalr. 1, B. S. 199, 263, 311-329, 351-388; Löhr Mag. 4, B. 1, Hft. nr. 5; Madahn Misc. 1, Sct. 8, 20-24.

² P. 24, 3, 18, § 1; C. 5, 14, 8; C. 5, 20, 2; vide et Leyser, Müller, et v. Tigerström, l. c. Eisenhard de Fideijuss. Dot. § 9.

³ P. 23, 3, 7, pr. § 1; Id. 10; C. 5, 12, 20.

⁴ P. 24, 3, 7, § 12.

⁵ P. 24, 3, 18, § 1; P. 25, 2, 24; P. 47, 2, 49, § 1.

⁶ I. 2, 8, Arg. pr.; C. 7, 8, 1; C. 5, 12, 3; P. 38, 16, 3, § 2; contra, Hellfeld Jur. For. § 1236; Voet. L. 23, t. 3, § 4; Vinn. ad. I. 2, 8, pr.; v. Tigerström, l. c. S. 263-77; Lobethan Eherecht, S. 119; Hasse, l. c. S. 567; Burchardi differt in toto, l. c. S. 140.

⁷ P. 23, 5, 5, 6, 7, 16 & 13, § 2; P. 5, 12, 75 & 30; I. 2, 8, pr.

⁸ I. 2, 8, pr.; P. 23, 5, 4; C. 5, 13, 1, § 15; Boettcher Vicim. J. R. circa Obl. et Alien. Fund. Dot. Goett. 1797-8.

⁹ Straben, 5 B. 100 Bed.; Lauterbach Coll. L. 23, t. 5, § 16; Müller ad Leyser, obs. 550; contra, Voet. L. 23, t. 5, § 16; on the Nov. 61, c. 1, § 1, 2; sed vide Glück. P. 25, B. S. 412-18.

Rights of
assimilated by
Justinian.
Exceptions per-
mitting sale.

sent of the wife to a mortgage than to a definite sale. Justinian abolished, however, this diversity of law, dependent on geographical position, and prohibited both the sale and mortgage, with or without consent of the wife, except in three cases,—where sold to the husband *venditionis causâ*—where the alienation was necessary—or where beneficial to the wife, that is to say, when the price realized by the sale of the *fundus dotalis* enables the acquisition of a more profitable estate, or where the wife and her children are in a state of absolute want.¹

§ 1094.

The husband's
responsibility for
culpa.

The husband is bound to avoid the smallest neglect as to the objects included in the dormant right of property of the wife, although he be not absolutely owner;² but if he prove that he has used that care which he was accustomed to take of his own property,³ slight neglect *culpa levissima*, in acts of omission as well as of commission, are to be passed over,⁴ and he is answerable for only *culpa lata*, or gross negligence, only when the wife (that is, he on her part) has neglected to demand the object back; he is not, however, responsible for accidents;⁵ at the same time, he must bear the burthen attaching on the object, in return for the enjoyment of it.⁶

§ 1095.

Rights of the
wife on the *dos*.

The wife has few particular practical rights in respect of her dotal property during coverture,—the most important of which is, that she possesses a legal and privileged right of pledge.⁷ In addition to this, although she cannot demand her dotal goods from the husband, or from a third party,⁸ she can assert her right when the husband becomes hopelessly insolvent,⁹ or has given rise to a suspicion of waste,¹⁰ in which case the husband is permitted to return it voluntarily; in like case, when the wife has duties to fulfil other than the payment of her debts, or if she make therewith a profitable investment in land.¹¹ An immoveable *dos* exempts the wife from giving caution in suits.¹²

By the Codex
the wife has no
right to property
purchased by
her husband
with dotal prop-
erty.

It is a question as to whether she obtains a property in objects purchased by the husband with dotal funds, *si res succedit in locum pretii*? If the laws of the Codex be preferred, the answer is

¹ Stryk. U. M. L. 23, t. 5, § 7; contra, Lauterbach de Fund. Dot. § 27, 29; Glück. l. c. 403-4.

² P. 24, 3, 18, § 1; Id. 24, § 5; Id. 25, § 1; Id. 66, pr.; Id. 67; P. 23, 3, 9 & 17, § 1; Id. 49, pr.; Löhr Theor. der Culpa, S. 165-7; Schoemann's Handb. 1, B. S. 336-8; Hasse v. d. Culpa S. 561-69.

³ P. 23, 3, 17, pr.; P. 24, 3, 24, § 5; v. Tigerström, l. c. 1, B. S. 329-47; contra, Kritz über Culpa, Leipz. 1823, S. 43-165; Glück. P. 25, B. S. 118-127.

⁴ P. 24, 3, 9,

⁵ P. 23, 3, 10, pr. 1; Id. 14, 15, 16 & 42; C. 512, 30.

⁶ P. 25, 1, 13.

⁷ Vide Pignus et Thibaut, P. R. § 789-803.

⁸ C. 5, 12, 30.

⁹ P. 23, 3, 24.

¹⁰ P. 23, 3, 24, pr.; C. 5, 12, 29-30; Nov. 97, c. 6.

¹¹ P. 23, 3, 73, § 1; P. 24, 3, 20; vide difference of opinion in Savigny, Zeitschrift 5, B. 3, Hft. nr. 9; Glück. P. 27, B. S. 234-266.

¹² P. 2, 8, 15, § 3.

generally negative,¹ the conflict of laws upon this head being great² if the Pandects be disregarded.

The wife has a partial legal right to pledge her *paraphernalia*.

§ 1096.

The husband has those rights in the *paraphernalia* only which the wife has conceded to him;³ he can, moreover, be obliged to give an account of it.⁴ Nevertheless, he is presumed to be his wife's natural attorney in respect of such matters, and can act as such,⁵ and demand in case of necessity aliment thereout,⁶ and alienate them with consent of the wife.⁷

Husband's rights in the paraphernalia.

The English law of the wife's *paraphernalia*⁸ is borrowed from the civil law, and consist in her wearing apparel and ornaments suitable to her rank, even the jewels of a peeress. If the wife survive her husband, they do not pass to his personal representatives, and are protected against creditors.

In England.

§ 1097.

As the marriage still subsists in law during a suit for its dissolution—except, indeed, an interlocutory judgment of temporary separation has been obtained—all the effects of the marriage remain in full force; hence alimony is demandable *pendente lite*,⁹ and the husband, as natural and legal attorney of his wife, must advance the costs of suit. It is irreconcilable with strict rules of law,¹⁰ founded on plausible grounds,¹¹ that the husband can refuse this during a suit of adultery.¹

Claims on marriage property during a suit for dissolution of marriage.

Everything must be restored to its original condition, so far as this is practicable,—gifts must be returned; nevertheless, the party aggrieved can insist on his claims¹² on general principles. In cases of incest, however, confiscation of the whole property¹³ of the guilty party follows; and when anything else is done wittingly against law, the fiscus or exchequer seizes all gifts received, whether it be *dos* or *donatio propter nuptias*.¹⁴

After marriage dissolved or declared null and void.

¹ Glück. P. 8, B. § 585, S. 167-86; Gottschalk Discep. For. t. 1, c. 2, t. 3, c. 21; Gesterding vom Eigenthum, S. 302-8; Grollman und Loehr Mag. 14, B. 1, Hft. S. 76-7; Cocceii L. 23, t. 3, qu. 7; Faber. Conj. L. 5, c. 9; Hofacker Princ. t. 1, § 445; Klüber Kl. Jur. Bib. v. J. 1786, S. 168-90; Dabelon v. Concurse, 2nd Aufl. S. 368-72.

² P. 23, 3, 54; C. 5, 12-12.

³ P. 23, 3, 9, § 3; C. 5, 14, 8; Rütter Jur. Mar. circa Bona Paraph. ex lege Rom. et Pat. (Germ.) Illust. Goett. 1781.

⁴ P. 35, 2, 95, pr.

⁵ C. 2, 13, 21.

⁶ C. 5, 12, 29.

⁷ C. 8, 56, 6; Stryk. U. M. L. 23, t. 5,

§ 6; Höpfner Com. § 418, n. 6; the reverse opinion is not supportable.

⁸ 2 Bl. Com. 302; Noy. Max. c. 49.

⁹ Henning von der Alimentation der Ehileute und den Kosten während des Scheidungs processes Würtenb. n. Zerstr. 1782.

¹⁰ Leyser Sp. 313, m. 7; Müller, obs. 55; Thibaut P. R. § 348.

¹¹ Stryk de Decret. Interim. c. 2, n. 121; Reinhardh. ad Christineum, vol. 5, obs. 30.

¹² P. 12, 4, 8; P. 12, 7, 4, 5; P. 41, 9, 1, § 3, 4; C. 5, 17, 10; Glück. P. 27, B. S. 60-7.

¹³ Nov. 12, c. 1, 2, 3.

¹⁴ P. 23, 2, 52, 58; C. 5, 5, 4, 6; v. Tigerström Dotal. 2, B. S. 134, 144.

The reciprocal succession of man and wife belongs under inheritances.

§ 1098.

Rights of parties to dotal property after dissolution of marriage. Wife's actions are *actio rei vindicationis rei uxoriæ ex stipulatu*.

After dissolution of marriage each party takes its own,—first of all, inasmuch as the woman's right of ownership revives at the death of the husband, she can require the restitution of the *dos*,¹ in person or by attorney, by an *actio rei vindicationis*,² *actio rei uxoriæ*, or the general action for restitution,³ *actio ex stipulatu*, which replaces it where there is an entire absence of precontract. Where a person, under whose control the daughter was not, has bargained the return of the *dos*, he must adopt the action originating out of the promise.⁴

If the wife die before the husband, though children of their bodies be living, the portion⁵ returns in strictness to the wife's family, for it was given to support the charge of a married state, since dissolved, and not for the education of children; but by agreement,⁶ and in the marriage articles usually drawn up before or after the marriage, the parties concerned might have settled the portion of the wife in another manner, and by that means it might remain with the husband, according to the old law, though they had no children.

§ 1099.

Dormant right of the wife to *dos* consisting in landed property.

Real property, in the English sense, was unknown to the Roman law—their real property rather resembled *chattels real*: these, whereof the wife is or hereafter becomes possessed during coverture, accrue to the husband on marriage; nor has he merely the profits and control, but also the actual disposition thereof,—so much so as to be liable to execution for his debts, and to become his absolutely on her decease; if the wife, however, survive him, her title thereto revives on his death, and consequently they are protected against his executors, in whom they do not vest, as he is unable to dispose of them by will, any more than he during his life has power over property vesting in the wife as an executrix of a third party.

§ 1100.

Tenant by curtesy of England.

By the *curtesy of England*, where a man marries a woman seized of lands and tenements in fee simple or fee tail—that is, of an estate of inheritance—and has by her issue, *born alive*, which was capable of inheriting her estate, he holds the lands for his life, as tenant, by the curtesy of England.⁷

Some derive the term from *curialis*,⁸ as alluding to the lord's

¹ Barbosa tr. ad Tit. Sol. Mat. Frft. 1625; Fol. Stieber de Rep. Dot. Basil. 1728; Westphal. v. d. Anfall des Heirathag. nach getrennter Ehe, Hal. 1779; Ruiz de Rep. Dot. Giess. 1741.

² C. 5, 12, 30.

³ I. 4, 6, § 29; C. 5, 13, 1, pr. 1, 2.

⁴ C. l. c. § 13.

⁵ P. 23, 3, 6, 23, 4, 26, 2.

⁶ P. 23, 4, 1.

⁷ Litt. § 35, 52.

⁸ Crag. L. 2, t. 19, § 4.

court, there to do homage, because after the wife's decease the widower did homage alone, whereas during his wife's life they would do it jointly; but Littleton¹ says, because it is used within the realm of England only, where it is said to have been introduced by Henry I. :² this, however, does not appear to be the case, it being also existent in Scotland, and introduced in the reign of Henry III. into Ireland also. Why then the curtesy of *England*, in contradistinction to that of other countries?

The requisites to this tenency were,—

Its requisites.

A legal and canonical marriage.

The actual possession or seizin of the wife, in incorporeal hereditaments quasi seizing. The king is entitled to the curtesy of idiots, who cannot take care.

The birth of the issue alive.

A child brought into the world by the Cæsarean operation does not give the husband any curtesy, for the mother died *before* the birth. Again, if a woman be tenent in tail *male*, and has issue a *daughter*, or vice versa, the husband loses his curtesy; but he is tenent *initiate* on the birth of the child capable of inheritance, but *consummate* only on the death of the wife; nor does it matter whether the wife's seizin be before or after the death of such issue, provided it be born during coverture. One exception only exists, which is, as to gavel-kind lands, when a husband may be tenent in curtesy without having issue.³

Blackstone thinks this curtesy is founded on the natural guardianship of the father to his child, who has the curtesy for its maintenance; consequently, the lord of the fee cannot be guardian during the life of such tenent :⁴ but how can this reason hold? for, as we have seen, the widower has his curtesy though the issue be dead, and cessit necessitas cessit ipsa lex?

§ 1101.

The return of the *dos* would be demanded in certain cases. Of the *dos adventitia*, when a third party was donor and so stipulated,⁵ can be demanded back, and thus became specially *receptitia*; but if this be not the case, the daughter surviving⁶ and emancipated from the paternal power before the claim, can demand it of her own motion, or if not emancipated, the father can do so with her consent; but should he be absent, she can do so of her own motion; but if the wife be dead, her heirs succede to her rights.⁷

Return of the
dos adventitia.

Receptitia.

With respect to the *dos profectitia*,—if the father, as grantor, have contracted for the return on his own behalf or on that of his

Profectitia.

¹ Litt. § 90; Co. Litt. 30, 67.

² Mirror, c. 1, § 3.

³ Co. Litt. 29.

⁴ F. N. B. 143.

⁵ Passin Burchardi Grundz. S. 118-42;

v. Tigerström Dotl. 2, B. S. 68-107.

⁶ P. 24, 3, 29, § 1; P. 15, 13, 1, § 13.

⁷ P. 24, 3, 2, pr. § 1, 2; Id. 3, 30, § 1, 31, § 2 & 35.

children, or have permitted another to do so, the contract forms the rule.¹ If, on the contrary, he have not done so, the daughter being under power, he can enforce the return of it with her concurrence;² it then remains the property of the daughter, and must be again given if she remarry, vesting absolutely in her on the father's death.³

In what cases daughter and father can reciprocally refuse to return the dos.

The father has, however, the power of excluding his daughter for bad conduct, on the claim for the return being put in; on the other hand, the daughter alone can exclude the father and sue alone,⁴ if he be morally debased or not in a position to support the claim. After the death of the daughter, the father sues alone.⁵ If the daughter be emancipated, and living, on the dissolution of the marriage, she can sue alone; but if her death dissolve the marriage, the sole right to sue devolves on the father, even though the daughter may have left issue.⁶

On the death of father and daughter, their heirs come in.

If the father be dead, and the daughter die, the *dos* devolves on their heirs,⁷ whether the daughter be emancipated or not.

§ 1102.

Against whom an action for return lies.

The action lies against the person who demanded the grant of the *dos* and his heirs; nay, even against whomsoever may be in possession of it.⁸

§ 1103.

How dower is lost in England.

Dower is *barred* in England by divorce *a vinculo matrimonii*; for as Bracton expresses it, *ubi nullum matrimonium ibi nulla dos*, thus a divorce *a mensâ et thoro*, for even adultery, is not sufficient.

By elopement,⁹ where a woman leaves her husband and lives with an adulterer.

On marriage with an idiot, no dower can take place.

By treason or felony on the part of the husband, which is abated by statute¹⁰ quoad felony, but revived quoad treason.¹¹

In case of an alien married without licence.

And if the wife be under nine years of age at the husband's death.

Dower may also be barred by forms called conveyances to uses, to bar dower, being a conveyance taken by the husband of his land so framed on the statute of uses as to effect this object. Greater facilities than formerly, to the barring of dower, have been

¹ P. 24, 3, 22, pr. & 29, pr.; P. 23, 4, 23, 45; P. 5, 12, 26; C. 5, 14, 7.

² C. 5, 13, 1, § 13, 14; P. 24, 3, 2, § 13; P. 4, 4, 3, § 5; P. 21, 2, 71; P. 35, 2, 14, pr.

³ P. 243, 2, § 1; Id. 3 & 22, § 1 & 3, 6; Nov. 97, c. 5.

⁴ P. 24, 3, 2, § 1, 2; Id. 3, 22, § 1; Id. 34, 37.

⁵ P. 23, 3, 6, pr.; C. 5, 10, 4; C. 5, 13, § 17, 14; Voet. L. 14, t. 3, § 7.

⁶ P. 23, 3, 6, pr., for controversy of the glossators, vide v. Savigny Gesch. des R. R. 4, B. S. 83-4; Glück. P. 27, B. S. 145-245; Thibaut P. R. § 853.

⁷ Vide three next notes.

⁸ P. 24, 3, 22, § 12; Id. 3, pr.; Id. 46; C. 5, 18, 2, 9.

⁹ 13 Edw. I. 34.

¹⁰ 1 Edw. VI. 12.

¹¹ 5 & 6 Edw. VI. 11, 13.

introduced by the statute of wills,¹ by which real property is made devisible; the husband may bar his wife's dower, by devising for his wife's benefit any part of the land that had been subject to her dower, unless a contrary intention be expressed in the will, though she be not excluded; dower is also barred if the devise be of land, on which she would have no claim, or of personality, without express declaration, by introducing into the deed by which the land is conveyed to the husband, or any deed executed by him, a declaration to that effect. Or by a similar declaration introduced into his will.

§ 1104.

If the defendant be only sued for restitution as possessor, nothing further can be claimed than that which every *bonæ* or *malæ fidei possessor*, as the case may be, is bound to give; when, on the other hand, he lies under any particular obligation, he must, if the ownership of the objects have vested in him, return the *res fungibiles* in like quality and quantity for others, paying the price agreed;² but if he have the option of re-delivering the objects or their value, he may liberate himself by delivery of the objects, even though they may have deteriorated; and the wife, it has been seen, may vindicate from creditors³ on her husband's insolvency such of her property as has been purchased.

Conditions of action and recovery.
Bona fides.

Res fungibiles returnable in specie, even if deteriorated.

When the objects are returnable *in specie*, the principal thing is due with all its accessions;⁴ when it has been used up or consumed without the husband's fault, he is not compellable to pay the value.⁵ The law of the Pandects enforces this when the wife has brought clothes as her *dos*:⁶ a provision⁷ left unaltered by Justinian, and which is reconcilable with his regulations as to the usufruct of wearing apparel.⁸ The husband can be made answerable for every damage referable to his fault,⁹ and to pay four per cent. interest, accounting for the fruits which had accrued during marriage.¹⁰

Accessions due.

Culpa of the husband.

His right to the fruits determines with the marriage; on the other hand, the moment of the *dos* has been settled, or, when done before marriage, the moment of contracting the marriage, is the point when it accrues.¹¹

§ 1105.

The term for the return of articles, part and parcel of the *dos*, varies according to their nature; corporeal immoveables are due

Term for the return of the *dos*.

¹ § 4 W. IV. 105.

² P. 23, 3, 10, § ult.; Id. 11.

³ Vide ante, § 1091.

⁴ P. 23, 3, 10, § 1; C. 5, 12, 21.

⁵ P. 23, 3, 10, pr. § 1; P. 24, 3, 49, § 1.

⁶ P. 23, 3, 10.

⁷ P. 23, 3, 10, is controverted, vid. Leyser Sp. 304, m. 3, 4; Hommel Raps. obs. 69; Puf. T. 1, obs. 206, § 17-21; Müller ad Leyser, obs. 381.

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⁸ I. 2, 4, § 2.

⁹ Vide ante, § 1094.

¹⁰ P. 24, 3, 7, § 1, 2, 3; Id. 31; C. 5, 13, 1, § 9; Cujac. obs. L. 14, c. 22; Cocceii, I. C. L. 24, t. 3, qu. 2.

¹¹ P. 23, 3, 7, § 1; P. 24, 3, 7, § 1 & 11, & 15; Glück. P. as to this controversy, 27, B. 272-354; v. Tigerström Dotatr. 2, B. S. 154-178; Schraeder de divisione practicum dotis, Helmst. 1805; Hasse im Rhin. Mus. 2 B. 1 Hft. § 1-11.

at once, but other objects in a year on security being given by the husband;¹ but it is erroneous to suppose that the wife can infringe upon the corpus for a year's maintenance, where the interest or fruits are not sufficient for the purpose.²

Proof of illation necessary;

by the husband's deed when sufficient.

In order to sustain this action for return of the *dos*, proof of the *illatio* or actual payment must be given, which may be conclusively done by the husband's deed; but Thibaut is³ correctly of opinion that this cannot be considered satisfactory proof against creditors, inasmuch as the husband, as usufructuary, is not only open to the suspicion of being his wife's partizan, but also of a temptation to create an instrument which has the effect of protecting the *dos* against his creditors.⁴

§ 1106.

Pleas available by the defendant: *beneficium competentiæ*;

compensation and retention.

There are many claims which are competent to the defendant by way of set off; among which are the *beneficium competentiæ*, and indemnity for work and labor, which latter is not admissible when it has been expended on or about fruits not returnable;⁵ when they are *necessaria* and expended upon the chief object itself, the husband has a claim to indemnity; and when they are considerable and⁶ extraordinary, such as costs of suit,⁷ but not when they are by the nature of the object ordinarily necessary to raise it.⁸ The defendant has two defences,—in the first case, the plea of compensation and that of retention,⁹ and his action attaches on the *dos*¹⁰ after delivery of it as payer of a debt not incurred on his own account, or incurred as administrator or as agent, if duly authorized as such.

Compensation can also be claimed for expenses actually incurred for the benefit of the subject-matter, provided they be moderate and not incurred by order of the wife,¹¹ whom the defendant cannot, however, annoy by exceptions, being unconditionally bound to deliver up the subject-matter, but he may then bring his action for indemnity as mandatarius or administrator.¹²

Value of ornamental improvements cannot be claimed.

No claim can be made for ornamental improvements, whether the wife concur or object to an innocuous separation, he had a right to make, or when was enabled, an opportunity having offered, to sell the object to better advantage upon such account.¹³

¹ P. 24, 3, 24, § 2; C. 5, 13, § 7; v. Tigerström, l. c. 2, B. S. 846-57.

² Contra, Glück. P. 27, B. S. 270-1; pro. Westphal. v. Anf. des Heirathsg. § 23.

³ P. R. § 357, ed. 8.

⁴ Ludovici de probatione illationis dotis, Hal. 1711; Glück. a. a. O. 335-51.

⁵ P. 25, 1, 3, § 1; Voet. L. 25, T. 1, § 5; Maiansius de expens. in rem. dot. fac. Disp. T. 1.

⁶ P. 25, 1, § 3; Müller ad Leyser, obs. 575; Wernher, lect. c. L. 25, T. 1, § 2; contra, Leyser Sp. 321, m. 5.

⁸ P. 25, 1, 4 & 1, 5.

⁹ P. 23, 3, 5, pr. § 2 & 56, § 3; C. 5, 13, 1, § 5; Glück. a. a. O. S. 382, 146; contra, Voet. l. c. § 1; v. Tigerström, l. c. 2, B. S. 315-30.

¹⁰ P. 25, 15, § 2 & 12; P. 24, 3, 7, § 3.

¹¹ P. 25, 1, 8; P. 13, 7, 25.

¹² C. 5, 13, 1, § 5; Cocceii I. C. L. 25, T. 1; contra, as to the exceptio compensationis, Lauterbach Coll. L. 25, T. 1, § 10.

¹³ P. 25, 1, 9, 10, 11; C. 5, 13, 1, § 5.

§ 1107.

In the case of other things the usual remedies must be sought,¹ except in cases of theft, where a particular rule applies. The *condictio furtiva*² only applies before marriage; but after coverture, and in contemplation of its dissolution, the person robbed and her heirs have their *actio rerum amotarum directa*;³ but if the theft took place in contemplation of death, the plaintiff may use the same action equitably (*utiliter*);⁴ the heir, on the other hand, must content himself with the *hæreditatis petitio*, *actio ad exhibendum*, and *condictio ob injustam causam*.⁵ If husband and wife be guilty of theft, the *actio rerum amotarum* lies for restitution of the object and appurtenances, or their value, and they are deprived of their *beneficium competentiæ*;⁶ but it only extends to heirs when they have been enriched thereby.⁷ The *actio rerum amotarum*, however, presupposes that the dissolution of the marriage has followed,⁸ except only when the action is brought for the recovery of some object the property of another, taken from one of the parties to the marriage;⁹ for the general rule is, that during coverture an *actio in factum* or *rei vindicationis* alone will lie.¹⁰

General remedies, when to be resorted to; in cases of theft.

Actio rerum amotarum directa. Utiliter. Hæreditatis petitio, ad exhibendum, condictio ob injustam causam.

Actio in factum. Rei vindicationis.

All legal remedies are available in the case of a theft committed after dissolution of marriage.¹¹

§ 1108.

Dissolution of marriage has the same operation as natural death *quoad* the parties, being civil death *quoad* the marriage; hence follow the same consequences as to property; thus, if the one party assume the veil or the cowl, his or her property falls to the issue of the marriage, if any, otherwise to the religious house; and the other party resumes its share, and can even demand what has been promised in case of the other party's death, and the quasi survivor can forthwith remarry.¹²

Distinction of the dos on dissolution of marriage; on taking the vows;

In like manner, sentence of the court,¹³ which is a second species of civil death, of the marriage, annuls it with its consequences as natural death, together with all the promises dependent on that state, and each party can withdraw his property; but a mere separation *a mensâ et thoro* has not this effect, or indeed none whatever upon the property of the respective parties *per se*.

on sentence of dissolution by the court;

The woman divorced for reason of adultery forfeits her *dos* as punishment, and all her other property; and the man on his side also, under similar circumstances, is involved in the same penalty.¹⁴

on adultery proved, forfeits the whole property.

¹ P. 23, 3, 9, § 2.

² P. 25, 2, 3, § 2; v. Tigerström, l. c. 2, B. S. 277-99.

³ P. 25, 2, 6, § 3; Id. 22, § 1.

⁴ Id. 24, pr.

⁵ Id. 6, § 5 & 22, § 1.

⁶ P. 25, 2, 1, 3, § 3; Id. 22, § 1 & 21, § ult.; C. 5, 21, 2.

⁷ P. 25, 1, 6, § 4; C. 5, 21, 3.

⁸ P. 25, 1, 16.

⁹ C. 6, 2, 22, § 4.

¹⁰ C. 5, 21, 2.

¹¹ P. Id. 3, pr.

¹² C. 1, 3, 53, § 3 & 56; Nov. 22, 5 & 117, 10; Dabelow Eher. § 331-3; Westphal. v. Anfall d. Heirathsg. § 10.

¹³ Gottschalk, Discept. For. T. 2, pr. 4.

¹⁴ Nov. 117, 8, § 2, X. 1, 4, 10; Nov. 134, 10, X. 4, 20, 4; Nov. 12, 1, 2, 3.

Penalties attaching on divorces for other causes.

In divorces without any particular cause, or for reasons allowed on legal grounds,¹ the woman forfeits, if she be to blame, her *dos*; the man, his *donatio propter nuptias*, or in default thereof, one-fourth of his property up to 100 pounds of gold.²

Consequences of false accusation of adultery.

If the husband falsely accuse his wife of adultery, she can demand dissolution of the marriage and one-third of the *donatio propter nuptias*, when there is no issue; for otherwise, the whole property of the husband devolves upon the children.³

§ 1109.

Origin of usucapion.

Usucapion has been referred to various origins: occupation has, by some,⁴ been considered the true foundation of usucapion; but as flocks, arms,⁵ and *pretiosa* were not subject to this law, and as no sufficient reason is given for their being excepted, another origin must be sought. Walter thinks that the *in jure cessio* was originally the only mode of obtaining quiritian property; this was effected by the would-be acquirer assuming the property of the object, and bringing an action of vindication before the prætor,⁶ who adjudged the subject-matter to the plaintiff, by the default of the supposed possessor; this mode of transfer is mentioned in the Twelve Tables,⁷ but is supposed to have given way to the more convenient later form of mancipation.

In *jure cessio*.

The origin of common recoveries in England.

We find ecclesiastical bodies in England evading the statute of Mortmain by this fiction. A collusive action was brought against the owner of the land who had received the value of it on a supposed prior title, which not being defended, the religious house obtained judgment. These actions obtained the name of common recoveries.⁸

The effects of the *in jure cessio*.

This *in jure cessio* was originally the only means of obtaining a quiritian title as between patricians and plebeians, because tradition conferred a mere inchoate right by detention or possession *de facto*, which required to be perfected by usucapion; indeed, originally the plebeians could hold by no better title than possession, being incapable of quiritian ownership, until Servius Tullius conferred that capacity upon them, and provided that it should be obtained by the form of mancipation.

The *in jure cessio* was not, however, abolished. The co-existence of the two forms is explained by tradition conferring quiritian ownership in *res nec Mancipi* only, and by the *in jure cessio* being applicable to all objects whatever; while the mancipation applied to *res Mancipi* alone.

§ 1110.

Usucapio, a mode of acquisition.

Usucapio, then, was one of the modes of acquisition invented by the civil law. This so-termed *usus auctoritas* is said to have

¹ Glück. P. I. c. 38-9.

² C. 5, 17, 8, § 7; Nov. 22, 30; Nov. 98, 1; Nov. 117, 8-9; Glück. P. 27, B. S. 96-103.

³ Nov. 117, 9, § 4.

⁴ Bocking Inst. I. § 73; Puchta Inst. II.

§ 238.

⁵ Walter Gesch. des R. R. § 535.

⁶ Galus, 2, 24; Ulp. 19, 9-10.

⁷ Frag. Vat. § 50.

⁸ Bl. Com. B. 2, Ch. 18.

been derived from the law of Attica,¹ whence it is supposed to have been introduced by the decemviri into the Twelve Tables. The decemviral laws² ordained a difference in the usucapion of *mobiles* and *immobiles*, that is to say, it was requisite that, to acquire an indefeasible right to moveables, they should have been in the actual bonâ fide possession of the claimant for an entire year; but of immoveables, for double that period, *auctoritas fundi biennii ceterarum rerum annuus usus esto*; the reason of the distinction was, probably, founded in the exercise of acts of ownership, which were so much more evident in the case of moveables than in that of land. At the time this law was introduced, the Roman power was confined to Italy; consequently, usucapion could only apply to estates subject to the Italian law, in other words, capable of transfer by the solemn quiritian form of mancipation; *immobilia nec Mancipi* were unknown, because, until long after that time, no private individual was capable of possessing property in the provinces, the legal estate in which, vesting in the *populus*, was not exposed to usucapion; it is true that such outlying lands were let out to provincial farmers or citizens at an annual rent, nevertheless, the ultimate fee, to use a modern expression, or *dominium directum*, was in *populus* or state, whence these farms were termed *prædia stipendiaria* and *tributaria*.³

Introduced into Twelve Tables by Decemviri. Difference between mobiles and immobiles decreed by decemviral laws.

Usucapion applicable only to estates subject to Italian law.

Immoveables, on the contrary, whether *Mancipi* or *nec Mancipi*, in Italy were subject to usucapion. *Usucapione dominiâ adipiscimur tam Mancipi rerum quam nec Mancipi*,⁴ although, as has been before remarked, usucapion was denuded of some of the advantageous incidents of mancipation, although it was of more general application, not being, like the latter, confined to a certain category of things.

As strangers, formerly termed *hostes*,⁵ were devoid of civil rights, so they were incapable of acquisition by usucapion as well as by other means, until it was gradually conferred on the Junian Latins, and on such *peregrini* as were fortunate enough to have received the *jus commercii*.

Strangers incapable of acquisition by usucapion. Right extended to Junian Latins and peregrini enjoying *jus commercii*. Caracalla conferred on ingenui citizenship mancipation, legal assignment, and usucapion.

The constitution of Caracalla, it will be remembered, conferred the citizenship on all the *ingenui* of the Roman world, and with it the rights of mancipation, legal assignment, and usucapion; and although latinity consequently fell into desuetude, yet *peregrinitas* remained; and upon those who were still in this category, the various advantages of the *nexus*, inheritance, and usucapion, was occasionally wont to be conferred.

§ IIII.

Although the law of the Twelve Tables prohibited the usucapion of things furtively obtained; this appears, however, to have been understood of the thief himself only, until the *Lex Atinia*

The Lex Atinia.

¹ Plut. de Leg. 12.

² Gothofr. ad Leg. XII. Tab. tab. 6.

³ I. 2, 1, § 40.

⁴ Ulp. Fr. 19, 8.

⁵ Cic. de Off. 1, 12; P. 50, 16, 234.

enacted¹ *ut quod subreptum esset, ejus æterna esset auctoritas nisi si in ejus, cui subreptum esset, potestatem revertisset*; this law is supposed to have been passed before Scævola, Brutus, and Manilius, but it is mentioned by Cicero.²

Usucapion did not apply to cases of an adverse possession. *Lex Atinia* introduced.

Usucapion, nevertheless, did not apply to all cases in which an adverse possession of a year or two had been had; and first, the Twelve Tables prohibited the usucapion of things stolen: as this, however, only went to the actual thief, the *Lex Atinia* being introduced to protect the rightful title to stolen property in the hands of a third party acting in good faith, if the object had, in the interval, not passed through the power of the true owner, *ut quod subreptum esset, ejus rei æterna esset auctoritas, nisi si in ejus, cui subreptum esset, potestatem revertisset*.

§ 1112.

The *Leges Julia et Plautia*.

This law was followed by the *Leges Julia et Plautia* (*Plotia*) *de usucapionibus*, and prohibited³ forcible possession from conferring a right by prescription, the question of thefts having been settled by the *Lex Atinia*; Cælius, Cicero and Sallust both mention a Plautian or Plotian law, which is said to have been introduced by Marcus Plautius, tribune of the people. The Julian law *de vi publicâ et privatâ* was, however, as Hottomann⁴ shews, introduced by Augustus.

Lex Julia and *Plautia* on usucapions.

The *Lex Julia* and the *Lex Plautia*⁵ on usucapions, which was consolidated with it, extended to cases of public or private violence, the principle which the *Lex Atinia* established as to theft, and took them out of the category of usucapion under the same condition.

§ 1113.

Lex Scribonia.

The next law⁶ which touched upon usucapion is the *Lex Scribonia*,⁷ introduced by Scribonius Libo, A.U.C. 721, in order to bring services within the law of usucapion. In more remote times, services were held incapable of usucapion, for being incorporeal, they were incapable of possession,⁸ because corporeal possession could not be had of them; their usucapion was then abhorrent to the principles of law, the more so, inasmuch as in the Twelve Tables no mention was made of the usucapion of things incorporeal;⁹ moreover, usucapion was a mode of acquiring dominion, whereof services were incapable. Although all this is undeniable, yet use came to be considered by the lawyers to be a species of quasi

Use quasi possession.

¹ Paul. P. 41, 3, § 6; Jul. L. 33, pr. P. eod.; I. 2, 6, § 2.

² Clc. in Verr. 1, 42; Vin. Pighii An. T. 2, p. 255, A.U.C. 506; Hein. A. R. 2, 6, 1, et seq.; Gell. N. A. 17, 7; P. 41, 3, 4, § 6; P. id. 33, pr.

³ P. 33, 2. These two are always mentioned together as the *Leges Julia et Papia Poppæa*, because treating on the same subject, but are of different dates. There were also two *Leges Plautiæ*, the second, *de vi aut rebus vi possessis non usucapiendis*, was intro-

duced about A.U.C. 675; the first, in A.U.C. 664, did not treat on this subject. Heinocius A. R. confuses these, vid. edit. of that author, by Haubold, 1822, Francfort.

⁴ De Leg. p. 77.

⁵ Epist. ad Fam. 88; Ad Att. 4, 16; Pro Cæc. 26; Pro Milo, 13; Sal. de Bell. Cat. 31, A.U.C. 664.

⁶ P. Ibid. 33, § 2; 2, 6, § 2.

⁷ P. 41, 3, 33, § 2.

⁸ P. 41, 3, 25; P. 8, 2, 32; P. 41, 1, 43.

⁹ P. 8, 2, 14, pr.

possession, and, upon this fiction, the usucapion of rustic service *rata auctoritas harum rerum omnium a jure civili sumitur*.¹ This introduction was, however, considered so illogical and so irreconcilable with the logical principles of the ancient lawyers, and probably was so generally unpopular, that it was considered advisable to abolish the usucapion of services by this *Lex Scribonia*;² nevertheless, despite of this law, all claims to services which had not been forcibly or clandestinely acquired, or the exercise whereof was not precarious, obtained a remedy by the equitable (*utilis*)³ prætorian action. Justinian abolished this law, and admitted the prescription of all services and incorporeal things.⁴

Abolishment of usucapion of services.

§ 1114.

In course of time, this short term allowed for usucapion was found to be inconvenient, and often to operate injustice and to facilitate fraud, and therefore gradually gave way to a more extended period; this was termed *longa possessione capio*⁵ and *longæ possessionis prærogativa*,⁶ and is laid down as regards immoveable by Paulus;⁷ *inter præsentis decennii, inter absentes vicennii spatio continuo*. There existed, nevertheless, considerable essential difference between the old usucapion and the new. The old usucapion was a matter of strict law; the latter was alloyed by equity. Usucapion paid no respect to the presence or absence of the parties; the new law admitted a difference. In cases of usucapion, the period was always certain and fixed; not so by the new law, for when the title could not be proved, antiquity, whereof the memory of man runneth not to the contrary was required, *quæ legis vicem sustinet*.⁸ Lastly, the usucapion of immoveables only applied to Italian estates; the new law extended to provincial possessions.

The extension of the law of usucapion.

The old law of usucapion compared with the new.

New law prevailed over the provinces.

Justinian⁹ removed this distinction, probably, partly in consequence of the abolition of the distinction between *res Mancipi* and *nec Mancipi*, conferring, moreover, on simple tradition all the effects of the ancient mancipation; usucapion or prescription¹⁰ was now defined as *adjectio domini per continuationem possessionis temporis lege definiti*. The emperor¹¹ extended this definitively to the provinces, and fixed the following rule,—moveables were prescribed in three years immoveables, where the parties were present in ten years, in twenty in case of absence, that is to say, two years were made in this case equal to one; it is, nevertheless, no longer a matter of doubt that Justinian adopted as law those rules which the prætorian equity had found it expedient to introduce from time to time.

Changes in the law of usucapion and prescription.

Definitive extension.

§ 1115.

In the case of usucapion, the acquirer is supposed to act in good faith, believing, though erroneously, that he has acquired

The principle of usucapion.

¹ Cic. pro A. Cæc. 26; Ulp. Fr. 10 § 1.

² P. 41, 3, 4, §

³ P. 8, 5, 10.

⁴ P. 41, 4, 4, et 61.

⁵ P. 43, 19, 5.

⁶ R. S. 5, 2, 3; P. 18, 1, 76.

⁷ C. 7, 33, 12; Raevard, l. c.; Ant.

⁸ P. 39, 3, 1.

⁹ C. 7, 31, 1.

Schult. Jurisp. vel A. J. p. 256, seq.

¹⁰ P. 41, 3, 3.

¹¹ C. 7, 31.

from one empowered to transfer the property in the object; and, after a lapse of time, on the true owner reclaiming his property, retains it as against him by right of a certain duration of possession regulated by law; by these means a title, otherwise defective, was rendered valid, conferring a right of action against all parties afterwards obtaining possession thereof, and converting *possessio* (or the right *in bonis*) into *dominium*.

§ 1116.

Prescriptio differs from usucapio in that it was an exceptio only.

Contrast between usucapion and prescription. As to the object.

Prescription originally differed from usucapion in the respect of *bona fides* not being required; it was an *exceptio* against the true owner, but gave no right of action to recover from other parties who might subsequently have obtained the possession.

Usucapion did not apply to incorporeal, but merely to corporeal things, and in this respect differed from prescription, quoad the *object*.

As to the term.

With respect to time, the usucapion of moveables was formerly perfected after lapse of a year; of immoveables, in two years in Italy, to avoid uncertainty. This time, Justinian enlarged to three years in the first case, and ten in the second, adding ten more in favor of parties who might be absent, extending it, moreover, to all the empire.

As to the effect.

With respect to the *effect*, usucapion conferred a right of action as above observed, enabling the *bonæ fidei* possessor to maintain an action as plaintiff against others; whereas, prescription merely supplied the defendant with a defence, without putting him in the position to become a plaintiff.

§ 1117.

The four great periods which affected usucapion.

The first refers to the law of the Twelve Tables.

To a fuller understanding of this subject, it may be convenient to follow it categorically through the four most marked periods or changes that took place.

The *first period* refers to the law of the Twelve Tables, assigning a year for moveables and two years for immoveables, *usus auctoritus fundi biennium cæterarum rerum annus esto*: this must be explained as applying to incorporeal things and property in Italy, not to incorporeal rights and provincial lands; lastly, the rule applied only to Roman citizens.

The second period, to the *præscriptio longi temporis* of the prætor.

The *second period*. Inasmuch as usucapion was confined within such narrow bounds, the prætor invented the *præscriptio longi temporis* as a supplement to the usucapion, the place of which it supplied; for instance, it applied to a *peregrinus*, giving, however, the imperfect title *retinendi et excipiendi*, which nevertheless vanished with the loss of possession; in short, it gave a holding title. The prætor, however, appears occasionally to have allowed even this, giving a *utilem rei vindicationem* against other possessors;¹ in this case, however, *bona fides* uninterrupted possession

¹ P. 12, 2, 13, § 1; C. 9, 39, 8; P. 2, 15, 9; P. 46, 3, 91; P. 41, 4, 4, § 1 & 14.

for ten or twenty years, and a *justus titulus* were required: it is a question whether three or the ten and twenty years were necessary in the case of immoveables.

The third period. The emperors Theodosius and Anastasius introduced the prescription of thirty and forty years to actions—that is, actions which were formerly not limited to half, one, three, five, ten, and twenty years, but were perpetual, or were prescribed in thirty or forty years. Anastasius, moreover, limited fiscal actions to forty years. This prescription, however, conferred no further right than an *exceptio* or plea, and that of bringing an *exceptio utilis*.

The third period.
Theodosius and Anastasius.

The fourth period was that of Justinian, during which the prescription of moveables was fixed at three, that of immoveables at ten and twenty,—in a word, he increased the period of usucapion, extended it to real property in the provinces, giving the *præscriptio longi temporis* the advantage of *rei vindicatio*, and applying it to objects without good title but possessed in good faith in the beginning; he also gave a prescriptive right after thirty or forty years, in the case of *mala fides*, but the plea of prescription endured only so long as possession was retained, but no *rei vindicatio*; he further applied the prescription of thirty years to the *res adventitiæ filiorum familias*, and to things sold *bona fide* without just title.¹ With respect to things belonging to the fiscus, he retained the *præscriptio longi temporis*, and introduced the hundred years prescription for ecclesiastical property.²

The fourth period,
Justinian.

§ 1118.

The policy of the law of prescription was clearly to fix the right of property,³ which should be certain, for *dominia rerum non debent esse in incerto*, encourage trade, and put an end to controversy, *usucapio constituta est ut aliquis litium finis esto*, by inflicting punishment on the negligence of a true owner who should culpably allow his right to become thus obsolete,⁴ upon the principle,—*videtur alienare qui patitur usucapi*. The law of nature, which directs that every man should have his due, is not, it is asserted, changed here, but merely corrected by a more important one, namely, the maintenance of public societies of men, though it be against the interest of certain private individuals; moreover, a man bringing himself within the operation of laws inflicting the penalties of prescription, may be said to consent tacitly to its consequences.

The policy of
the law of pre-
scription.

§ 1119.

The five requisites of prescription are:—*bona fides*, or good faith;—a *justus titulus*, or good title in the abstract;—*uninterrupted possession* for the term fixed by law;—*the expiry of that term*;—and

The requisites of
prescription.

¹ Nov. 22, c. 24; Nov. 131, c. 6.

² C. 1, 2, 23; Nov. 9.

³ P. 41, 3, 1; P. 41, 10, 5.

⁴ P. 50, 16, 28.

the *rei qualitas*, or capacity or liability of the object to prescription.

Bona fides.

And, first, as regards the *bona fides*,¹ or honest design on the part of the person pretending to the prescription, the bare possession being insufficient, is requisite. This good faith and honesty will appear if possession be had from one who was esteemed the true owner by the possessor at the time of delivery, except in a case of purchase, where the *bona fides* is required at the making of the contract as well as on the delivery of the object;² thus the prescription will not be interrupted, or the *bona fides* impugned, if the buyer subsequently become informed that the seller was not the true owner, but it sufficeth that there was no guilty knowledge in the beginning.³

The Canon law rule.

The Canon law is more tender of the conscience, ruling that if⁴ at any time the party prescribing be conscious that he derives his possession from a wrong doer, such knowledge interrupts the prescription, which wholly militates against a maxim some interpreters would introduce into the civil law.

Justus titulus.

Secondly, a *justus titulus*, or a just, particular, and real cause⁵ or title, is required, for instance, by sale, gift, exchange, or the like,—in fact, such a cause as would entitle the receiver to the property from the true owner; for if there be no true cause, or one insufficient to transfer the property (as if the thing were only deposited for safe custody, or possessed by tenants, &c.), no prescription can follow. Here it will not suffice that I believe my title good, it really must be so, and ignorance of the fact is only excusable if it exclude the supposition of a *culpa lata*, or of *levis* only. With respect to an *error facti*, it must be one that may readily be excused; or, on a point of law, such an one as is not generally known. A simulated or revocable contract, therefore, gives no title, or a *donatio mortis causâ*, i.e. a gift to take effect after death.

Possessio continua.

Thirdly, *continuous possession*⁶ is required to support the title by prescription, and such is to be presumed till the contrary appear. The possession of tenants and proxies⁷ continue the possession for the true owner, not for themselves, nor is it necessary that the possession should always reside in the same person. An honest purchaser⁸ may begin the prescription in himself, laying aside the time acquired by a dishonest vendor, because he himself fairly paid the price; but where the thing has been acquired gratuitously, as by gift,⁹ legacy, or succession, if there be fault or bad faith in the vendor, there does not seem so much reason in continuing the prescription.

¹ I. 2, 6, pr.

² P. 41, 4, 2.

³ C. 7, 31, 1.

⁴ In vi^{to} 5, 12, 2, de Reg. Jur.

⁵ P. 41, 3, 27.

⁶ P. 41, 3, 3.

⁷ P. 41, 3, 33, 4; I. 2, 9, 5.

⁸ P. 41, 4, 7, 6.

⁹ P. 44, 3, 5.

Every interruption before the lapse of the period of prescription was termed *usurpatio*,¹ and is either natural and in fact or civil, in the contemplation of the law. A *natural*² interruption is when a moveable thing is taken from the possessor, or an immoveable entered upon and seized by another, or deserted by him, or when the alienation results in a breach of trust on the part of him who was entrusted with the possession in another's name.

Interruptions of prescription may be natural,

A *civil* or *legal* interruption may be by citation or other judicial claim,³ as by filing a libel or bill before a judge if the defendant abscond or become a madman, but more especially when the suit is contested, or issue is joined upon the right, and sentence delivered by the judge. This interruption includes only the parties to the suit,⁴ but *de facto* extends to all parties whatever.⁵ A prescription may also be suspended for a certain time, simply not advancing as in times of general sickness or war where the party is prevented from making his claim; but if the courts of justice remain open, there is no reason it should be so suspended.

or civil.

Such total interruption is termed simply *usurpatio*; the casual interruption, *interruptio temporalis*. The Canon law will interrupt in the case of *mala fides* subsequently occurring on the principle above stated.

Usurpatio by the Canon law.

Fourthly, a *lawful time* is required to give title by prescription. This is three years for moveables, and ten for things immoveable or incorporeal,⁶ if the persons assuming right inhabit the same province; but if residing⁷ in different provinces, then twenty years⁸ are required to gain a prescriptive right to an estate; the same time is also generally required to limit real actions and criminal prosecutions,⁹ for after that lapse of time circumstances may have changed so as to reduce the importance of public prosecutions.

The legal period.

Time is not computed from moment to moment, or from hour to hour, but from day to day. *In usucapionibus non a momento ad momentum sed totum postremum diem computamus*, says the Digest.¹⁰ *In omnibus temporalibus actionibus nisi novissimus totus dies compleatur non finit obligationem*; ¹¹ the first moment of the last day being computed as one whole day in favorable cases.¹² And,

Expiry and computation of time.

Lastly, *the thing prescribed must be capable of prescription*, wherefore there is no prescription of things exempted from commerce,¹³ as of a freeman, things consecrated to God, or of things once lodged in the *fiscus* or *exchequer*.

The object must be capable of prescription. Objects exempted from prescription.

¹ P. 41, 3, 2 & 5; P. 1, 2, 2, § 36; P. 8, 5, 6, § 1 & 8, 9, 16; P. 4, 6, 40, § 1.

² P. 41, 3, 5.

³ P. 44, 3, 10; C. 7, 33, 1.

⁴ P. 41, 3, 5.

⁵ I. 2, 6, pr.

⁷ C. 7, 33, 12.

⁹ C. 3, 31, 7.

¹⁰ P. 41, 3, 6.

¹¹ P. 44, 7, 6.

¹² P. 44, 3, 15.

¹³ I. 2, 6, 1; P. 41, 3, 9.

⁸ C. 3, 31, 7.

guished from *res fiscales* or state property,¹ are not liable to be prescribed; nor the goods of churches,² cities, hospitals, or things stolen,³ for they may be concealed till the time of prescription come; nor the goods of infants⁴ and minors, nor of soldiers⁵ on expeditions, or of those absent on the⁶ affairs of the commonwealth; but the period of absence is to be deducted from the time, for *absentia ejus qui reipublicæ causâ abest neque ei neque alii damnosa esse debet*,⁷ and in another place,⁸ it is called *officium publicum nulli nec damni nec compendii sit*, nor the goods given as bribes to magistrâtes;⁹ and lastly, things prohibited to be alienated by last will.¹⁰ Hence it is that moveable things are seldom prescribed on account of some of these incapacities.

Reason of the difference in the various terms of prescription.

The reason of this difference in the times of prescription is allowed in order to give those living at a distance a longer time to make their claims. If the parties have residences in several provinces, they are reputed present at each; and if a man have no dwelling-place of his own, and neglects what belongs to him, that person may be deemed present everywhere. Such are the common prescriptions of time applicable to all things belonging to private persons capable of prescription, and when possessed *bona fide*; but there are other prescriptions of longer time, of thirty and forty years,¹¹ by which even stolen goods and those possessed by force may be prescribed by the civil law, without regard to the justice or injustice of the first title, for the sake of public tranquillity, the only ground upon which it can be justified in conscience.

The Canon law.

The Canon law does not concur therein, but rules the contrary.¹²

§ 1120.

Prescription of thirty years for personal and mixed actions;

Personal and mixed actions continue regularly within thirty years;¹³ and bare possession for so long a period confers the right; and although thirty years is generally the limit, yet sometimes, by reason of privilege in the thing or person, or on some other particular account, the time is extended to forty,¹⁴ and sometimes to one hundred years,¹⁵ as against the Roman church; nay, sometimes time out of mind¹⁶ is required, as in the exercise of a right not continually made use of, as right to draw water, &c.

generally of forty and a hundred years.

To whom it applies.

The prescription of thirty or forty years includes soldiers¹⁷ in actual war, women, persons absent, minors, but not infants, though the former prescriptions could not include them.

¹ C. 7, 38, 2.

² C. 1, 2, 23.

³ I. 2, 6, 2 & 8.

⁴ C. 7, 35, 3.

⁵ C. 7, 35, 8.

⁶ C. 7, 35, 4.

⁷ P. 50, 17, 140.

⁸ P. 4, 60, 29.

⁹ P. 48, 11, 8.

¹⁰ C. 6, 43, 3, 3.

¹¹ C. 7, 39, 3 & 4.

¹² D. 2, 26, 20.

¹³ C. 7, 35, 5.

¹⁴ C. 7, 39, 4, § 9.

¹⁵ Nov. 9.

¹⁶ P. 4, 2, 20, 3, 4; P. 8, 6, 7.

¹⁷ C. 7, 39, 3.

§ 1121.

Things belonging to the treasury (*fiscus*) are not subject to usucapion.¹ Papinianus, however, ruled that in cases of *bona vacantia* not yet appropriated by the fiscal officers, a *bonæ fidei* purchaser could gain usucapion if the thing be delivered to him, a rule confirmed by Severus and Antoninus. Hence it results that no prescription under thirty or forty years applies to things regularly acquired by the *fiscus*,² but are, as it were, owing to it,—such, for example, as the property of persons condemned for treason;³ if such things, however, be neglected by the treasury, then four years are sufficient;⁴ but if not announced to the treasury *si non nunciata*, three years suffices for moveables, and ten for immoveables.

How prescription generally affects *res fiscales*.
Bona vacantia.

Bona patrimonalia, or the emperor's property, as a private man, are not subject to prescription according to the argument of Vin-
 ius; neither are *bona domanalia*⁵ or crown lands, of which the emperor as such has only the usufruct, the property or dominium thereof being in the state, are not liable to prescription of any length of time, for as belonging to the state, they vest in all the citizens thereof; they are, moreover, *exempta commercii*, for the same reason.

Bona patrimonalia *Cæsaris*.
Bona domanalia or crown lands.

From the foregoing, it resulted that prescriptions up to twenty years were called *præscriptiones longi temporis*, and those of one hundred years, *longissimi temporis*; the first conferred by the old law, partly a releasing, partly an acquisitive power; the latter was introduced by the emperors, and conferred before Justinian only an extinctive right; this emperor, however, gave it also the acquisitive right. Acquisitive prescription operates to confirm the possession to a thing, or the exercise of a right already possessed; extinctive prescription to extinguish the right of another on my person or property. Savigny repudiates this distinction.⁶

Operative effect of *præscriptio longi et longissimi temporis*.

Acquisitive right introduced by the Emperors.

§ 1122.

To the *præscriptiones longi* and *longissimi temporis* must be added *præscriptio immemorialis*, a right whereof the memory of *testes senes* runneth not to the contrary; such *senes* must, it would appear, be over fifty years of age at least: this differs from the *præscriptio definiti temporis* in the *presumptio legalis*, and can only be met by the other party showing a *vitiosum initium*.

Præscriptio immemoralis, what.

An action for verbal injuries⁷ is barred after one year, as also all popular actions,⁸ that is to say, those instituted for the benefit of the public. By four years' possession, the exchequer or public treasury⁹ is secure against all claims and quoad forfeited goods; and if the exchequer sell, or give to a private person, his title upon the mere delivery is unquestionable; but the aggrieved party

¹ I. 2, 6, 4.

² C. 7, 39, 4.

³ C. 9, 8, 5.

⁴ C. 1.

⁵ C. 7, 38, 2, 2.

⁶ Syst. des H. R. R. 2, 4, § 237, p. 266.

⁷ C. 9, 35, 5.

⁸ C. 7, 37, 1 & 2.

⁹ P. 47, 23, 8.

has his remedy against the exchequer, if he sue in time; this was introduced to encourage persons to purchase from the public. It extends to the emperor's patrimonial and private estate,—and by a particular constitution,¹ the empress has the same privilege.

Res meræ facultatis, what.

Res meræ facultatis, or such things as may be done or left undone at pleasure, without incurring an obligation to continue the exercise of the right, as, for instance, the right to build in my yard, and shut out another's light, though I have not done so as yet, and my neighbour has no *jus luminum*, marrying, making a will, buying or selling, carrying arms, and the like. Savigny repudiates this expression.²

§ 1123.

The particular division of prescription.

Legalis.

Conventionalis or testamentaria.

The operation of prescription varies according to circumstances, and may be divided into that which, of necessity following the provisions of law, and from which nothing can be taken, and to which nothing can be added, is termed *legalis*, and that which is exposed to modifications; the first is the term assigned by law in the cases to which it is made applicable, and the latter that allowed to be established by private individuals, founded on contract or testament, and termed *conventionalis* or *testamentaria*; that prescription termed *judicialis* must not circumscribe or extend the legal period, except where the rights of third persons would be injured; hence the judge cannot enforce the *exceptio præscriptionis* by virtue of his office. The *præscriptio longissimi temporis* forms an exception; and this cannot be extended by the judge, but he must, nevertheless, take judicial notice thereof,³ *virtute officii*.

§ 1124.

Extinctiva.

Acquisitiva.

Translativa.

Extinctiva per non usum.

Usucapio

libertatis,

præscriptio

extinctiva in

specie.

Præscriptio acquisitiva.

Præscriptio is said to be *extinctiva*, when an object is acquired by the extinction of another's right; but when more is acquired, it is termed *acquisitiva*; this, again, may be *translativa*, when the whole right of the loser is transferred. Sometimes a right is lost by the laches of him to whom it appertains, the *extinctio juris per non usum*; but at other times, by the act of the acquirer, as in the case of the *usucapio libertatis*, generally called *præscriptio extinctiva in specie*.

§ 1125.

The law of the Pandects is most clear on the subject of the acquisitive prescription; nor is it now any longer a matter of importance, whether it takes its origin from the old usucapion, or from the later prætorian prescription and more recent constitutions.⁴ It is now material to consider more nearly the *præscriptio longi temporis* or *usucapio* of three, ten, and twenty years, and the *præscriptio longissimi temporis*.

¹ C. 7, 37, 3. This resembles the Parliamentary title.

² Syst. des H. R. R. 2, 4, § 237, p. 267.

³ P. 21, 1, 31, § 22; C. 4, 54, 2; C. 7, 39, 3 & 4; Thibaut, P. R. § 1002.

⁴ Thibaut, P. R. § 1012.

§ 1126.

As it is necessary for the shorter prescription that, in addition to the general requirements of prescription,¹ which do not, however, regard the *titulus*, the possessor prove the justness of his title,² that is, that the object has been acquired by virtue of a³ well-provided right, arising out of a lawful transaction,⁴ whether there have been one or two parties to it.⁵ The *præscriptio ex titulo putativo* accrues even if there be no title; but some error as to its existence,⁶ which may be justifiable, exists.⁷

The shorter prescription.

The various particular tituli.

Titulus putativus.

The particular grounds of possession are to be sought in a title of the Pandects set aside for that subject.⁸

Those founded in law are principally the *titulus pro emptore*, when the property of another has been bought,⁹ even without payment of its price, in which case a justifiable error does not damage the purchaser.

Pro emptore.

The *titulus pro hærede* is when the true heir takes for himself, on demise of the person possessed, an object free from question, believing in good faith that it belongs to the estate; or, when one who is not heir is possessed, as putative heir, of an object subject to prescription as a part of the estate.¹⁰ No usucapion will operate, however, against the true heirs;¹¹ and for the same reason, neither against *sui heredes*.¹²

Pro hærede.

The *titulus* is said to be *pro donato*,¹³ when a person receives an object belonging to another as a gift.

Pro donato.

The *titulus pro derelicto* occurs in the case of one, who is not the owner, possessing a thing abandoned, as really so abandoned.¹⁴

Pro derelicto.

The *titulus pro legato* applies to the taking as a legacy, an object not formally bequeathed.¹⁵

Pro legato.

The *titulus* is termed *pro dote*, when the *actual* husband possesses a marriage portion or *dos*; but there is a conflict in the laws as to the title of the *putative* husband.¹⁶

Pro dote.

The prescriptive *titulus pro suo* applies to the affianced bridegroom, in cases where the *dos* has been delivered to him without any proviso for the retention of the property, and without any valuation (*æstimatio*) of the object.¹⁷

Pro suo.

¹ Löhr Magaz. 4, B. 1; Hft. S. 136-7.

² C. 3, 32, 24. ³ C. 7, 34, 1.

⁴ P. 41, 6, 1, § 4; P. 41, 5, 2, § 1; C. 7, 33, 8.

⁵ P. 41, 4, 5, 6, 7, 8, et 9.

⁶ P. 41, 4, 11; P. 41, 10, 5, § 1; Unterholzner 1, B. S. 359-363.

⁷ P. 6, 3, 3.

⁸ P. 41, 4; P. 6, 2, 8; Voet. 41, 1, § 1; contra Hofacker 2, § 970.

⁹ P. 41, 3, 48; P. 41, 4, 2, § 6; P. 41, 10, 5, § 1; P. 46, 4, 11; Cuj. ad Afr. Tract. 7, ad cit. L. 11, in opp. T. 1, p. 1405-6.

¹⁰ P. 41, 3, 33, § 1; P. 44, 3, 11; compare P. 41, 10, 5, § 1. For the

opinions of others, vid. Thibaut, P. R. § 1013, n. l. et Voet. 41, 3, § 1.

¹¹ Gaii Inst. 2, § 52-8; P. 41, 3, 3, § 201; Id. 29; C. 6, 30, 8; C. 7, 34, 4; contra Voet. 41, 5, § 2.

¹² C. 7, 29, 2. There is a discrepancy in the views of this law, vid. Westphal. § 667.

¹³ P. 41, 6.

¹⁴ P. 41, 7.

¹⁵ P. 41, 8.

¹⁶ P. 41, 9, 1, § 4; P. 23, 3, 67; Westphal. § 653; Voet. 41, 9, § 1; Glück, P. R. 25, B. S. 209-20.

¹⁷ P. 41, 9, 1, § 2; Id. 2; Val. Fr. § 111, v. Tigerström Dotatlr. 1, B. S. 301-11; Chesli Interpr. (in Juripr. Rom. et Attic. T. 2), Lib. 2, Cap. 26.

Applies to all not named technically.

Possessio pro suo is applicable generally to all the above, and all other *tituli* or species of possession; this expression is, however, more particularly used with reference to all such titles as are not particularly designated by any particular technical expression.¹

§ 1127.

Exception of *bona vacantia*, and fiscal claims in particular.

Moveables, it has been seen, are prescribable in three years; immoveables in ten, where the parties are present; or twenty, when absent:² by absence, without the same province being meant, but *bona vacantia*, or such inheritances as fall to the *fiscus* form an exception, and are absolutely acquirable in four years, when they have not immediately lapsed to the *fiscus* in consequence of a fiscal declaration, or they may follow the usual law of usucapion, when the *fiscus* has obtained possession of them before notification of the lapse made to the fiscal officer.³

§ 1128.

Præscriptio longissimi temporis particularly.

When, by any defect in the object or title, the prescription of the shorter period is not applicable; that of the longer period of thirty years,⁴ termed *longissimi temporis*, only applies, and is operative even when the possessor is proved to have no title; under this long prescription are included things belonging to the Romish Church, to render which susceptible of prescription, one hundred years must elapse.⁵

§ 1129.

Præscriptio servitutum follows that of the subject matter.

The prescription of services may be of ten among those present, and twenty among those absent, in such cases the subject matter must be obnoxious to prescription; the prescriber must, moreover, have a just title, nor must the service have been exercised clandestinely, permissively, or by force:⁶ The knowledge of the owner is always requisite in cases of this short prescription, when the service has been established on the property of another by one acting in bad faith:⁷ when, however, the subject matter is incapable of the short prescription, the service is only acquirable in thirty, forty, or one hundred years, according as these periods were requisite for acquiring by prescription the object whereupon this service is meant to attach;⁸ for the service so far savors of the

Prescription of 30, 40, or 100 years particularly.

¹ P. 41, 9, 1, § 2; P. 41, 10, 1.

² Nov. 119, 8; Toullieu de *præscript.* et *absen. mixtoq. tem.* Grœning 1719 (Coll. D. 18); Hago C. M. 5, B. n. 17; Unterholzner 1, B. S. 272-5; Meister *vindictæ legislat. Just de mixto temp. comput.* (op. n. 8.)

³ P. 41, 3, 18; I. 2, 6, § 9; P. 44, 3, 10; P. 49, 14, 1, § 2; C. 7, 37, 1, § 1120, h. op.

⁴ C. 7, 39, 3, 4, 8, contra Voet. de *Præscript. I. C. Acquis. Wirt.* 1807.

⁵ Contra Kori, § 71-2; Thib. *Schrift.* § 34.

⁶ C. 7, 33, 12, m. f. comp. P. 6, 2, 11, § 1; P. 8, 5, 10; C. 3, 34, 1 & 2; Vinn. Qu. Sel. L. 1, C. 31; Walch de *Præscript. Serv. Constitut. Jen.* 1797; Unterholzner 2, B. S. 144, 159, 189, 191; contra Hoepfner, § 352; vide et authority quoted by Thibaut, P. R. § 1017, n. § 1119, h. op.

⁷ Nov. 119, 7.

⁸ C. 7, 39, 3 & 4; Thib. *Schrift.* § 36, contra Bessel im *Archiv. f. Civ. Prox.* 13, B. 3, Hft. S. 424-5.

really that the same rule must be made to apply to the thing itself, and the service which must be regarded as a sort of detractive accession,—thus, if a person acquire by prescription a *prædium dominans*, he acquires with it the services attaching thereupon.¹

The English law appears to follow this principle,—in the case of adverse possession twenty years is required to acquire a title by prescription; be it to services (easements) or to the land itself, for a modern statute, reduced the former period to one-third of the term formerly required to that end.

English law follows the Roman in principle.

The Canon law² requires the prescribing church to prove the title, as against another, to services, in the case where the prescription of forty years obtains; otherwise immemorial prescription is necessary: and witnesses must be called in respect of the term as to whether the service be *continua* or *discontinua*.³

The Canon law.

§ 1130.

There are other rights besides those of property and services, viz., those of *superficies* and *emphyteusis*, which may be acquired by prescription on the same terms.⁴ Freedom is another right liable to acquisitive prescription among persons present in ten, or among those absent in twenty years, but otherwise in thirty.⁵ But it is an erroneous view not founded on any law that the right of property in a pledge can be acquired by prescription; although it may be held that no one capable of suing can deprive another of the possession of an advantage, when the latter has possessed it in good faith undisturbed for thirty years.⁶

Other rights obnoxious to prescription.

Right of pledge not acquirable by prescription.

§ 1131.

It is curious that the English lawyers did not, with so good a principle before them, at an earlier period adopt that of the Roman law with regard to prescriptions; and, instead of limiting actions from some fixed epoch which every hour necessarily rendered more remote, reckon the period an action should lie, backwards from the accretion of the right to sue, for the necessity of a limitation of some sort was evident as early as the reign of Henry II., when it was enacted that the demandant could not claim upon any seisin, in a writ of right, earlier than the reign of Henry I.;⁷ by the statute of Merton,⁸ earlier than the preceding reign; nor by the statute of Westminster,⁹ earlier than the reign of Richard I. These same statutes, thus enacted from time to time, re-appointed periods of limitation for many other kinds of real actions. To obviate this anomaly, the statute of limitations¹⁰ was passed which

Old principle of prescription in England;

was originally from fixed epochs.

¹ Vinn. ad I. 2, 26, § 12.

² In vi. 2, 13, 1; Glück. P. R. 9 B. § 629; Kori, § 74-77.

³ D. 2, 26, 8; Cocceii jus contr. L. 8, T. 1, Qu. 6; Müller ad Leyser, Obs. 257.

⁴ C. 11, 61, 14; Thib. l. c. § 35; contra Mævius, P. 3, Dec. 289; Unterholzner, 2, B. S. 242-260.

⁵ C. 7, 33, 2; Rave de præscr. § 97.

⁶ C. 7, 39, 3 & 4; Thib. l. c. § 37; Kori, § 74. Unterholzner, 2, B. S. 181-274; Glück. P. R. 18, B. S. 195-7.

⁷ Com. Dig. Temps.

⁸ 20 Hen. III. 8.

⁹ 3 Ed. I. 39.

¹⁰ 32 Hen. VIII. 2.

Principle altered
by the statute of
James.

adopted the Roman rule,—whoso, in a real action, claimed on his own seisin must claim within thirty years back, if on the seisin of his ancestors within sixty years; and in a possessory action within fifty. The statute of limitation of James¹ restricted the writ of formedon and the entry upon lands to twenty years, which has subsequently formed the rule in all actions of ejectment.

Disabilities of
plaintiffs.

Actions upon the case (except slander) were limited to six years; actions of trespass, to four; and of slander, to two years, next after the accruing of the cause of action. And after reversal in error, or arrest of judgment, to within one year. Where the plaintiff lay under any disability, such as nonage, imprisonment, coverture, or absence, the statute began to run from the time such disability ceased, the principle being that there should be a party capable of suing when the statute began to run. Actions in the Court of Admiralty for seamen's wages were subsequently limited to six years,² as well as those for not setting out tithes.³ But the last act⁴ passed limited actions for rent, not by specialty, to ten years after the passing of the act, or twenty from the accruing of the cause of action.

Instruments under seal are regulated by a later act,⁵ limiting actions thereon to twenty years, and money claimed under *feri facias* to six years; the same provisions as to disabilities are contained in this act also.

Other periods were fixed after the passing of the act of William⁶ for other cases, until six years had elapsed, which was the future period of limitation; the same rules as to liabilities were preserved, but the statutable time might be revived by certain written acknowledgments of a cause of action, from which the statute would again commence to run.

The acknowledgments or acts which are sufficient to take cases out of the statute have since been determined by the courts.⁷

Principles of
limitation.

There are several reasons for this limitation,—first, *interest reipublicæ ut siet finis litium*, or for the sake of peace and quiet, and the avoidance of perjury; secondly, for the avoidance of fraud, viz., that a plaintiff should not wait until all the witnesses for the defendant were dead; thirdly, upon the principle that *vigilantibus non dormientibus jura subserviunt*.

The difference between the statute of James and that of William is, that the former barred the remedy, the latter extinguished the right as well.

§ 1132.

Principles of the
prescriptio ex-
tinctiva.

It is a principle of the extinctive prescription, that no right is lost except the law expressly impose such penalty; and in the

¹ 21 Jac. I. 16.

² 4 & 5 Anne 16, § 17; 2 Geo. IV.;

³ 1 Will. IV. 20, § 72; 4 & 5 Will. IV. 52,

§ 31.

⁴ 53 Geo. III. 127, § 5.

⁵ 3 & 4 Will. IV. 42.

⁶ 3 & 4 Will. IV. 42, 3.

⁷ 3 & 4 Will. IV. 42.

⁸ Hart v. Prendergast, 16 M. & W.; vide 9 Geo. IV. 14, as to being in writing.

limited as well as in the long prescription, the right itself is only lost by the loss of the right of remedy,¹ that is to say, the right to maintain the action by which such right might be recovered; and although these terms are different as to their duration, there are certain general rules which invariably apply,—thus, for instance, *pendente lite* prescription is arrested and the right of action perpetuated. The rights of the papal chair have one hundred years to run; but those of churches, which according to common law would, under other circumstances, endure but ten, continue in that case for forty years;² and all other rights, for which the acquisitive prescription fixes thirty and forty years, are extinguishable in like periods.³

§ 1133.

Almost all actions are obnoxious to the extinctive prescription, and certain general rules are applicable. The codex terms those actions *perpetuæ*, which must be begun within thirty years, if more ancient or more recent laws have not assigned to them a longer or shorter period; in which latter case, they are termed *temporales*.⁴

Præscriptio
actionum.

Actiones perpetuæ last forty years; temporalis a shorter period.

The requisites of prescription of actions are various,—first, it is necessary that the *actio* be *nata* or legally possible,⁵ hence the right of action on *pactum additionis in diem* expires at the moment at which a better offer has been accepted by the vendor,⁶ and here the rule may be assumed to be, that in mutual obligations a ground of action will not arise until the execution have been actually obtained;⁷ in like manner, the *jus reluendi* of the pawnor is extinguished at the moment only at which he pays the price of redemption,⁸ and the right of re-sale according to the more general opinion, first, then, when in the absence of any other particular contract, the vendor by tendering the price has shown his readiness to redeme.⁹ *Tantum est præscriptum; quantum possessum*¹⁰—is a maxim importing that whoso seeks to acquire possession by this prescription must have been in this state of possession continuously during the whole period, and he cannot prescribe beyond his

Pactum additionis in diem, when it expires.

Jus reluendi.

¹ P. 12, 2, 9, § 4; P. 44, 4, 5, § 6; P. 44, 7, 6; C. 88, 36, 5 & 6; Comp. Nov. Val. 8; Cod. Th. 4, 14, 1, § 1; C. 7, 39, 4 & 9; conflicting are the opinions of Weber; Arch. f. C. P. 1, B. 1, Hft. S. 70-77, vid. Nat. Bewerb.; Pfeiffer Prac. Auf. 2, B. nr. A. III.; Rosshirt Zeitschr. 2, Hft. nr. 2; Büchel Civ. Rechtl. Erört. 1 Hft. Marb. 1832.

² C. 1, 3; Auth. D. 2, 26, 13 & 14.

³ Thib. Zeitschr. § 41.

⁴ C. 7, 39, 3 & 4; Gröning Flor. sparai ad præscrip. contra civitates Gress. 1775, p. 26.

⁵ C. 7, 40, 7, § 4 & 1, § 2.

⁶ Menken de act. ex, ed. Madihn, p. 624, et ibid. Madihn contra Stryk. U. M. L. 18,

L. 18, T. 2, § 8; Wernher Lect. Com. ibid. § 1.

⁷ P. 13, 7, 9, § 3, 5, 20, 1, 13, § 4.

⁸ Toullieu, Coll. Diss. 3, Schmid opusc. de præscrip. circa peg. opusc. 2, 3; Gæterding Pfandr. S. 365-6, contra Vinn. qu. sel. L. 2, c. 6; Westphal. Pf. R. § 250; Erleben de J. P. § 294-5; Cocceii, l. c. L. 13, T. 7, qu. ult. et Emminghaus, ibid. Glück. P. R. 14, B. S. 170-7; Unterholzner 2, B. S. 328-30.

⁹ For conflicting opinions, Menken. l. c. p. 225; Hopfner Com. § 873, n. 4; Weber, in the note 2 to § 81-82, n. 3; Glück. P. 16, § 998; Unterholzner 2, B. S. 316-19.

¹⁰ In vi^o 5, 12, 8, 3.

**Actio finium
regundorum.**

possession; hence the *actio finium regundorum*, as long as the confusion of boundaries endures, is not susceptible of prescription;¹ this, however, will not include claims of personal indemnity.² The right of demanding certain dues at certain terms, *annua menstrua*, &c., is extinguished in thirty years quoad the individual and singular dues; but the whole right is not lost unless the obligee have utterly denied the right, and the claimant has allowed the period of prescription to pass by without taking latterly any steps to enforce it.³ But it is different as to capital out at interest.⁴ It is, moreover, indispensable to success that the claimant should not admit the right of his opponent; hence we must understand the maxim that actions *communi dividundo*, *finium regundorum familiae heriscundæ*, and *pro socio* are limited to thirty years,⁵ with this qualification, viz., that the one party has arrogated something exclusive to himself as against the other;⁶ but if the conditions of the extinctive prescription be not already due, although those of the acquisitive are so, the former will follow as a regular consequence of the latter.⁷

§ 1134.

**Exceptions from
the maxim that
all actions
endure thirty
years.**

**Actions on
gambling debts
run fifty years;
those against the
fiscus, forty.**

**Querela inoffi-
ciosi testamenti
vel donationis,
five years.**

**Action of in-
demnity against
fiscus, four
years.**

**Right to exa-
mine deceased or
bankrupt estates,
five years.**

**Cessio usufruc-
tus.**

There are many exceptions to the maxim that all actions endure thirty years; for the term may be greater or less. In some cases it is *extended*, as in the instance of the action for the recovery of a gambling debt, which runs fifty,⁸ and the personal actions of the fiscus, which run forty years; other suits of the State, and those pending before a court, and many ecclesiastical suits, usually form an exception.

In other cases this term is *diminished*. The right to bring the real actions *querela inofficiosi testamenti* and the *querela inofficiosa donationis* endures only five years;⁹ but the *actio suppletoria* does not form an exception.¹⁰ Among the *actiones personales et rei persecutoria*, the action for indemnity runs against the fiscus for things alienated, and by the fiscus against the possessor of heirless property in certain cases, four years only. The right of the wife to separate property from an inheritance, in the case of bankruptcy¹¹ as against creditors, or the right of insisting on an examination of the *status* of the deceased, is limited in five years;¹² and the personal action for cession of usufruct, according to the presence or absence of

¹ Hellfeld Jur. For. § 719; for other opinions vid. Fachinei contr. L. 6, c. 36; Cocceij, l. c. L. 10, T. 1, qu. 5; Müller ad Ley. obs. 720. The prescription of the interstitium, C. 3, 39, ult. Witterh de præa. pedum in Oelrichs Thesaur. Nov. nr. 7, D.

² Puf. T. 1, obs. 42.

³ Rave de præscrip. § 119; Thib. l. c. § 60; Gottschalk Disc. For. T. 2, nr. 6, 8, 29; contra Boehmer de præscrip. an.

redituum realium (Exerc. T. 5); Müller ad Leyser, obs. 449, 601.

⁴ C. 7, 39, 8, § 4.

⁵ C. 7, 40, 1, § 1.

⁶ Rave, l. c. § 127-147-9.

⁷ Toullieu, l. c. § 64-80; Thib. l. c. § 45.

⁸ P. 5, 2, 8, § 17; C. 3, 28, 34; C. 3, 29, 9.

¹⁰ Unterholzner 2, B. S. 66-69.

¹¹ P. 42, 6, 1, § 13.

¹² P. 40, 15; C. 7, 21.

the parties, in ten or twenty years.¹ On the other hand, the right of the vendor to sue on a *pactum commissorium*² is lost, if the vendor does not declare forthwith, *statim*,³ on the commencement of the operation.

Pactum commissorium.

§ 1135.

The periods during which an action will lie for a *restitutio in integrum* are likewise various. That for civil restitution runs, as a general rule, thirty years; no law limiting it to any shorter period.⁴ The *actio redhibitoria* can be brought within six months; that of *quanti minoris* within one year, when the security has been given against possible defects; but when the action is only brought for accessions, it runs two months only; but when the delivery took place under a *pactum displicentiæ*, six months, both of which come under the head of *tempora utilia*;⁵ and the same applies when the action is brought on the contract for a defect.

Prescriptio restitutionis in integrum, thirty years.
Actio redhibitoria, six months.
Quanti minoris, one year.
Pactum displicentiæ, six months.

The prætorian actions for restitution⁶ must be instituted within four years, forming a *tempus continuum*,⁷ as well as regards the beginning as the duration of the term; for in those admitted by the civil law, and not by analogy, an *annus utilis* only is allowed;⁸ hence the *actio quod metus causâ*, if brought for the quadruple amount, must, by the Roman law, be instituted within four years; but if all other remedies are barred, it may be brought at any time within thirty.⁹

Prætorian actions of restitution, four years.

Actio quod metus causâ.

The *actio de dolo* continues enforceable *biennium continuum*; but the *actio in factum de dolo*, thirty years.¹⁰

Actio de dolo.

Minors have four years after attainment of full age to sue for restitution,¹¹ to which three years are added when the *beneficium abstinendi* has been granted by the prætor.¹² If a minor obtain the *venia ætatis*, the limitation of the restitution will begin to run from that period, although he will be allowed his restitution in all cases until the expiry of the minority.¹³ But if one who could have claimed *restitutio* on the ground of his minority die as *major*, and a *major* be his heir, this latter will be allowed the time not expired; but if a *minor* be his heir, such heir has, in usual course, the advantages of this term, only dating from the moment of the majority, or *venia ætatis*. Now if he die as a *minor*, the heir, being *major* entering on the estate can claim four years, which

The restitution of persons under disabilities of age.

¹ C. 3, 33, 16. § 1; Thib. l. c. § 5.

² P. 18, 3, 4, § 2.

³ The exact import of this word is disputed, Klügel de lig. com. speciatim de præscr. act. de ea datæ, Wirt. 1795, § 12, seq.

⁴ P. 16, 1, 10.

⁵ P. 21, 1, 19, § 28-31, § 22 & 25; Hab. Ascher de præscr. redhibitionis, Goett. 1788.

⁶ Vid. post rest. in integrum et vid. Thib. P. R. § 684.

⁷ Unterholzner 2, B. S. 13-15; Burchardi Wiedereinsetzung in d. v. S. S. 517-529.

⁸ C. 2, 53, 7; Koch de præscr. rest. in int. Giess. 1784; Thib. l. c. § 49; Glück, P. 20, B. S. 152-62; Kind. qu. for. T. 3, c. 40.

⁹ P. 4, 2, 14, § 1, 2; C. 2, 20, 4.

¹⁰ C. 2, 21, 8.

¹¹ C. 2, 53, 7.

¹² I. 2, 19, § 2.

¹³ C. 2, 45, 5.

will begin to run from the moment of administration; but being *minor*, from the moment of attaining full age, or *venia ætatis*.¹

Capitis diminutio et absentia.

Those who claim restitution as quasi minors have four years for the purpose, as a *tempus ratione initii utili*, which begins to run from the moment at which they become aware of the infringement.²

The *restitutio ob capitis diminutionem* runs thirty years,³ but the *restitutio ob absentiam* four years only;⁴ the same term is applicable to the *actio in factum* against an *alienatio iudicii mutandi causa*, and the *actio pauliana*,⁵ as far as its full force extends; although it will extend⁶ to thirty years, running from the completion of the alienation of the bankrupt estate,⁷ when instituted simply for the restitution of the excess whereby the possessor has been enriched.

§ 1136.

Penal actions.

Public penal actions generally run twenty years;⁸ but the private ones, being prætorian, but one year, that is to say, whoso has recourse to the edict for obtaining a penalty must take his remedy within the *annus utilis*; nevertheless, the action is a perpetual one when the possessor is only sued for the excess whereby he has been enriched;⁹ hence it may be laid down as a general rule, that all interdicts founded on the prætorian edict are available quoad the capital for a year only, and afterwards only so far as the excess whereby the party is enriched.

Interdictum de vi;
de precario;

de glande legenda.

Actio furti manifesti.
Arbor. furt. cæs. serv. corrupt. rat. distr.;
de dejectis et effusis;

Individual decisions only are to be found on these points;¹⁰ but as they follow the above rule, the particular interdicts as to the prescription of which the laws are silent must be ruled by the same principles. The *interdictum de vi*, if persons belonging to an absentee are instituted,¹¹ and the *interdictum de precario*,¹² are, however, perpetual; but there must be some error in the general supposition that the *interdictum de glande legenda* runs only three days.¹³

The following run thirty years:—The *actio furti manifesti*,¹⁴ and the somewhat similar *actio arborum furtim cæsarum, servi corrupti, and rationibus distrabendis*. The *actio de dejectis et effusis*, when not brought on account of the death of a freeman.¹⁵

¹ P. 4, 1, 6; P. 4, 4, 18, § 5 & 19; C. 2, 53, 5.

² In. vi. 1, 21, 1, 2; Boehmer, I. E. P. L. 1 T. 41, § 9, 11; contra Vermehren, a. a. O. S.; sed vide Burchardi, a. a. O. S. 523-4.

³ P. 4, 5, 2, § 1. ⁴ C. 2, 53, 7.

⁵ P. 4, 7, 6; but see former reference, contra Boehmer, jus D. L. 4, T. 7, § 4.

⁶ P. 42, 8, 10, pr. § 24; Donzsum proc. § 113.

⁷ P. 49, 14, 18, § 10; Dabelow v. Concurr. 2, Ed. B. 452.

⁸ P. 48, 17, 3; C. 9, 22, 12; Kori, § 176-84; Hallacker de præscr. crim. Erl.

1788; Gründler on the præscr. of penalties, Halle, 1796.

⁹ I. 4, 12, pr.; P. 44, 7, 35; C. 8, 4, 2; P. 25, 2, 21, § 5; C. 5, 21, 2; Unterholzner 2, B. S. 339-43, 355-76, 379, 380, 425-29, 435-477.

¹⁰ P. 43, 1, 4; P. 43, 16, 1, pr. § 39; C. 8, 4, 2; P. 43, 17, 1; P. 43, 24, 15, § 3 & 22, pr.; P. 43, 29, 3, § 16.

¹¹ C. 8, 5, 1.

¹² P. 43, 26, 8, § 7.

¹³ P. 1. l. c.

¹⁴ P. 11, 3, 13; P. 27, 3, 1, § 23; P. 47, 7, 7, § 6.

¹⁵ P. 9, 3, 5, § 4.

All penal actions arising out of civil transactions in the *actio de recepto*;¹ and *de deposito*, on denial of the *depositum miserabilis*;² nor are civil actions for penalties excepted;³ neither can the actions for injuries be limited to a year without qualification,⁴ where they depend upon the equity of the prætor.⁵

In England, indictments and suits under penal statutes are limited⁶ in the case of the Crown to two, and in case of private informers to one year; but the Crown has the advantage of two years after the expiry of the one year of the informer, if the forfeiture be joint to the Crown and informer. But the common law recognises no limitation to criminal prosecutions by indictment.⁷

With respect to actions at the suit of the party aggrieved, such must, as a general rule, be brought within two years,⁸ save the penal statute in question enact otherwise.

Actions against justices of the peace or other inferior officers must be brought within six calendar months;⁹ and the same applies to the custom and excise duties, the time being limited to six months, and often to a less period.

§ 1137.

The *actio hypothecaria* runs *more or less* than thirty years,—it runs forty when the debtor is in possession of the pledge; but if a third party be in possession as pawner, it runs forty years if he live so long, and thirty or forty years after his death, according as he may choose to take into account the time of possession in the life of the possessor; if, however, he possess as possessor in such a manner as to give him the right to claim the short prescription, the action expires in ten years where the parties are present, and in twenty as regards absentees, otherwise in thirty;¹⁰ and these terms are without qualification when the principal debt is prescribed.¹¹

§ 1138.

Cases occur, however, in which an action not *per se* excepted departs from the rule. The *actio de peculio*, for instance, is limited as against the father¹² to one year, after expiry of the paternal power. The *actio pignoratitia* runs only two years, as to the redemption of a pledge adjudged to the creditor by the sovereign;¹³ and the *rei vindicatio* of minors five years after full age, when the curator has alienated an object without a decree.

¹ P. 4, 9, 7, § 6.

² P. 16, 3, 18.

³ I. 4, 12, pr.

⁴ Weber de Injur. 2 pt. § 18.

⁵ C. 9, 35, 5; Thib. l. c. § 53.

⁶ 31 Eliz. 5.

⁷ Dover v. Maestaer, 5, Esp. 92.

⁸ 3 & 4 Will. IV. 42.

⁹ 24 Geo. II. 44, 8.

¹⁰ C. 7, 39, 7, pr.; C. 7, 40, 1, § 1; Höpfner, l. c. § 1186.

¹¹ Büchel civilr. Erört. 1. Hft. 1832, S. 39-78; contra Löhr, l. c. 10 B. 1, Hft. S. 32-84; Bucholz jur. Abh. S. 390-2.

¹² P. 15, 1, 2, 19, § 1 & 27, § 2, 8; P. 41, 1, 16; P. 15, 1, 32, pr. § 1; vid. et Thib. P. R. § 262.

¹³ C. 8, 34, 3, § 2.

Nevertheless, this so-called prescription is properly only to be ruled according to the maxims of *ratificatio ex parte tutoris*.

§ 1139.

The right to
except when
lost by prescrip-
tion.,

Exceptio non
num. pec. et
ben. compet.

Exceptiones are lost by prescription when they could have been made available by action, and such action is barred by prescription,² but not otherwise; as a general rule to which, there are, however, certain exceptions, among which may be reckoned the *exceptio non numeratæ pecuniæ et dotis* and the *exceptio beneficii competentis*, in cases where a son, emancipated from the paternal authority, is sued after many years for a debt contracted during the period he was under the power of his father.

§ 1140.

Extinction of
services.

Negativa et
urbanæ.
Usucapio liberti.
Servitutes
affirm. rusticæ,
et reales discon-
tinuæ.

Actio confes-
soria.

Services are extinguished by prescription in ten years among those present, and in twenty in the case of absentees.³ The following qualifications must, however, be taken into consideration:—*Servitutes negativæ* and *urbanæ* presuppose a *usucapio libertatis* on the part of the *dominus servientis*; *servitutes affirmativæ* and *rusticæ* are lost by simple non user,⁴ whence *habitatio* is, however, excepted.⁵ The prescription of *servitutes reales discontinuæ* runs twenty years,⁶ but there is no limitation to personal discontinuous ones, and the right of footway to a grave;⁷ but the *actio confessoria* is lost in thirty years when the right is denied.⁸

§ 1141.

Prescription of
the pat. pot.

The paternal authority cannot be enforced when the son has been reputed free from it for thirty years;⁹ for it is not otherwise lost by extinctive prescription, although a presumption of the son's emancipation¹⁰ may lie in the fact of the son having lived as a *pater familias* for a long time.

§ 1142.

Prescription
longius temp.
applies to privi-
leges.

Privileges, except those of fairs or yearly markets, are¹¹ not extinguished by the prescriptions of the shorter period, although

¹ C. 5, 74, 3; Thib. l. c. § 55; Binder de præ. quinquennii circa res min. sine decreto alienatas, Tul. 1808; Schmidt de vindic. rer. pup. ad quinquen. restr. Roet. 1741, Hofacker princ. T. 1, § 672; Bucholz Jur. Abh. nr. 19, v. Bülow Abh. 1 vol. p. 251-70; de Weyke de temp. præscr. ex alien. rer. quæ. minor. sunt, Goett. 1810.

² P. 12, 2, 9, § 4; P. 44, 7, 6; vide et Höpfner, l. c. § 1199, n. 2; Hommel rhaps. vol. 3, nr. 481; Wehren on judicial exceptions, § 7; Sommer, scientific legal treatise, nr. 1; Archiv. f. civ. Prax. 10 B. 1 Hft. S. 80-1, & § 119, n. 7, l. c.

³ P. 8, 2, 6; C. 3, 33, 16, § 1; C. 3, 34, 13; Thib. l. c. § 8, 57, 58, 59; Glück.

P. 9 B. § 641; Dabelow 2, B. § 172-6; Kori, § 88; Eichmann, de non usus nat. vi, atque historia Altenb. 1011.

⁴ Vid. supra adnot. as to the view taken by Höpfner, l. c. § 368; Unterholzner, 2 B. p. 191-206; Hofacker princ. T. 2, § 1109.

⁵ P. 7, 8, 10, pr.; Unterholzner, 2 vol. p. 214; Thib. Civ. Abh. p. 20-22.

⁶ P. 8, 6, 7; C. 3, 34, 14, pr.

⁷ Thibaut on prescription, § 58.

⁸ P. 8, 6, 7, 7, 4, 28; P. 33, 2, 13.

⁹ C. 7, 39, 3, 4.

¹⁰ C. 8, 47, 1; Thib. l. c. § 61; Glück. P. 2 B. § 156; Müller ad Leyser, oba. 100.

¹¹ P. 50, 11, 1.

they, like all other things, are subject to the *prescriptio longissimi temporis*¹ in cases where the right is opposed, or where it is allowed to fall into desuetude.

§ 1143.

The right *adire hæreditatem*, or to administer to an estate, is in some cases liable to prescription. When the civil heir is called upon by those interested to declare whether he will administer or not, he must demand a *tempus deliberandi*; then, if he take no step during the period granted him, such laches is held equivalent to renunciation.

Prescription of inheritances.

Tempus deliberandi.

If a *hæres necessarius* wish to bring the *querela inofficiosi testamenti* against such heir, the civil heir must, if present, repudiate the inheritance within six months, or if absent, within double that period, or he will be treated as heir:² but if he be not pressed he may administer when he will, without reference to the time at which he became aware of the falling in of the inheritance; this privilege may, however, be rendered futile by another having in the mean time acquired the property in the individual objects by the acquisitive prescription.³

Querela inofficiosi testamenti.

The *bonorum possessio* can be admitted or prayed within the short *tempus ratione initii et cursus utilis*.⁴ Children and parents have a year, which in the former case is extended to three,⁵ if the children, being intestate heirs, acknowledged the *bonorum possessio*; while other persons can only lay claim to one hundred days.⁶ Justinian ruled that when the civil heir is excluded from the inheritance he is not admissible as prætorian heir.⁷

Bonorum possessio.

§ 1144.

The extinctive prescription applies to frauds on the customs.⁸ The right of sale by the *dominus emphyteuseos* lasts two months.⁹

Whoso is called to the office of tutor must claim his exemption within thirty days¹⁰ (fifty), if he live within 400 miles (Roman), or 400,000 paces of the town, a day being allowed for every 20,000 paces beyond that distance, and the exemption must be completed within four months.¹¹

Whoso have during some years paid too low a rate of interest in error is not obliged afterwards to pay an increased rate.¹²

Other cases of extinctive prescription frauds on the customs, and sale of an emphyteuticum. Time allowed tutors to obtain exemptions in case of absence and distance.

¹ Glück. P. R. 2, B. § 110; Hufeland, spirit of the, R. L. 1, V. p. 262-4-74-81; Fritz in Linde Zeitsch. 4, B. 2, Hft. nr. 6.

² C. 3, 28-36, § 2, et vide post marginal note *nus hæres*.

³ C. 6, 55, 1; C. 6, 30, 9; C. 3, 31, 3; C. 7, 34, 4; Thib. Verjährung (Limitation), § 63, p. 164.

⁴ P. 37, 1, 9, 10; P. 38, 15, 2, pr. § 1, 2.

⁵ P. 38, 9, 1, § 10 & 11; P. 38, 15, 4, § 1.

⁶ I. 3, 10, § 4; P. 38, 9, 1, § 12.

⁷ Thib. P. R. § 825; Glück. intest. succ. § 82.

⁸ C. 4, 61, 2.

⁹ C. 4, 66, 3.

¹⁰ Vid. § 812, h. op.

¹¹ P. 27, 1, 16, 38, 39, 45, § 1.

¹² Thib. P. R. § 201.

§ 1145.

Impediments
arrest the course
of limitation.

There are three modes by which the limitation may be arrested or avoided. The first of these is properly termed *impedimentum*, and is where the limitation has begun to run, but is arrested before its expiry.

Not in England.

This cannot occur in England, for where the statute has once begun to run no subsequent disability will stop it.¹

Are of two descriptions.

These *impedimenta* are of two sorts: in the one case the advantages of the possessor up to that time are not interfered with; and in the other, they revive when such impediment is removed, which latter is termed *præscriptio dormiens*.

Interruptio.
Naturalis or
civilis.

An *interruptio* is the destruction of the advantages of the possession up to that period, and is termed *naturalis*² or *civilis*; when, however, the prescribed term has run out, but is reversed, the act is termed restitution against the prescription, which, together with the *præscriptio civilis*, will be the subject of the following paragraphs.

Civilis.

Civil interruption arises when the capacity of prescription is judicially annihilated, as in the case of absence, on a formal protest being lodged against it.³

English law,
how the statute
may be barred
by action com-
menced.

The English law admits this principle in the case of absence, without the jurisdiction of the court, that is abroad,—thus, a foreigner who always resides beyond sea is not bound by the statute of limitations, nor does it begin to run against a foreigner until he comes into the country;⁴ but Scotland is for this purpose held to be a part of England.⁵ The creditor's, not the debtor's absence takes the demand out of the statute of limitations,⁶ and it will begin to run so soon as there is a party in the country capable of suing, but the presence of one of many plaintiffs suffices.⁷ The statute may be arrested by issuing a writ of summons, entering it on the roll, and keeping the statute alive by writs of *alias* and *pluries*.⁸

How the Roman
law may be
barred by cita-
tion.

In cases of
acquisitive pre-
scription.

If, by the Roman law, the judge or arbiter issue a citation,⁹ the prescription is interrupted quoad the plaintiff,¹⁰ so that forty years must be reckoned from such citation;¹¹ and this interruption also operates in the case of the *præscriptio acquisitiva longissimi temporis*, in so far as it is chiefly founded on the prescription of the right of action.

¹ Cotterell v. Dalton, 4 Taunt. 826; G. P. Doed Greggs v. Sheen, 1 Lela, N. P. 147, n. ² Vide ante, § 1118.

³ C. 4, 30, 14, § 4; C. 7, 40, 2; Grollmaun et Lochr, Mag. 2, 3, Hft. P. 379-82, 402.

⁴ Strithorst v. Græme, 2 W. Black. 723, 3 Wils. 145.

⁵ Surtees v. Allen, 6 Dow. 116; Rex v. Walker, 1 W. Black. 286; Campbell v. Stein.

⁶ Fladong v. Winter, 19 Ves. jun. 200.

⁷ Perry v. Jackson, 4 T. R. 516; as to executors vid. Smith v. Hill, 1 Wils. 134.

⁸ Archbold, Pract. Ed. 8, p. 1129.

⁹ C. 2, 56, 5, § 1; C. 7, 40, 3; X. 1, 20, 20; X. 1, 30, 10; Clem. 2, 5, 2; Boehmer, I. E. P. L. 2, T. 3, § 17; T. 16, § 2, 3.

¹⁰ C. 7, 39, 9; C. 7, 40, 1, § 1; Lende Zeitsch. 2 B. Hft. p. 171-6; 2 Hft. p. 177-233; sed vide Hommel rhap. V. 1, obs. 109, p. 172; Winkler de Lit. Cont. Sect. 3, § 3; Glück. P. 6, B. § 503.

In the cases of *usucapio et longi temporis præscriptio*, neither citation nor *litis contestatio* have the operation of the *interruptio*,¹ although, when the object is prescribed after the *litis contestatio*, the defendant can be compelled to restitution.² Prætorian actions are converted into perpetual ones when they are brought before the sovereign, who thereupon issue a rescript entered of record.³

Exceptions.

Minors and majors can obtain restitution after a prescription whereby they are damnified. Minors, with whom all such as have obtained the *venia ætatis* are on an equality as regards immoveables, can always obtain restitution⁴ against the *præscriptio conventionalis testamentaria* and *judicialis*, although they are deprived of it in the case of the *præscriptio legalis*, because they do not require it,⁵ inasmuch as the prescription of thirty years does not obtain against minors; but they are not restored as against the prescription *longissimi temporis*.⁶

Restitution to minors.

Præscriptio conventionalis testamentaria judicialis et legalis.

There are, however, certain exceptions. The ordinary prescription, for instance, runs against them in the case of *actiones vindictam spirantes*, and they are deprived of their restitution;⁷ moreover, the shorter prescription runs against them, save their right to restitution when they have not paid legacies within the year, and have not pleaded the *exceptio non numeratæ dotis* in due time;⁸ when they have neglected to apply for the *bonorum possessio*,⁹ and do not observe the usual chronic terms in the suit.¹⁰ But prescription will always run against those who obtain restitution by the analogy of minors; they, however, have a claim to restitution against the short, but not against the long prescription,¹¹—nay, even churches do not obtain it as against the latter.¹²

Exceptions.

Actiones vindict. spirant.

Exceptio non num. dotis.

Majors obtain, on the ground of absence, restitution¹³ unconditionally against the conventional, testamentary, and judicial prescription, when they have not rendered this unnecessary by protest,¹⁴ but against the legal only when the prescription is not *longissimi temporis*;¹⁵ and in this case, too, error is placed on an equality with fraud.¹⁶ The *actio recissoria* also applies in this place.

Actio recissoria.

¹ C. 7, 33, 10; Keller, *litis contestatio*, § 25, 26; Unterholzner 1, B. S. 440-1-8-50; Hufeland, *Handb. of Civil Law*, 1 V. § 717 (German); Buchholz. *Versuche*, nr. 11; contra Voet. 41, 3, § 19; Westphal. § 558; vide et Thib. P. R. § 1002, n. 4, and authorities there cited.

² P. 6, 1, 18, 20, 21; P. 41, 4, 2, § 21; P. 41, 5, 2; C. 3, 32, 26; C. 7, 33, 1.

³ C. 1, 20, 2; Löhr im *Archiv. f. j. C.* P. 10, B. 1, Hft. G. 84-6.

⁴ P. 4, 48; *ibid.* 3, § 8; Boehmer de *curru præscr. contra min. susp.* (Exerc. T. 2); Thib. l. c. § 64-71.

⁵ C. 2, 41, 5.

⁶ C. 7, 39, 3, 4; contra, Burchardi, *Wiedereinsetz.* in d. v. S. p. 132-40.

⁷ P. 4, 37; P. 47, 10, 7, § 1; C. 2, 22, 1.

⁸ Nov. 1, 4, § 1; Nov. 100, 2.

⁹ C. 2, 40, 2.

¹⁰ C. 3, 1, 13, § 11.

¹¹ C. 7, 39, arg. 3, 4; Thib. l. c. § 71.

¹² Contrary on authority of Clem. 1, 11, 1; Puff. de diff. præscr. Helmst. 1800, § 29, 30; Kühn de ben. rest. in int. eccl. contra præscr. denegando, Id. 1791.

¹³ P. 4, 1, 7, pr.; P. 4, 6, 41, 43; P. 20, 5, 7, § 1.

¹⁴ Höpfner, l. c. § 1182; Pfeiffer, a. a. O. G. 290-303.

¹⁵ C. 7, 39, 3, deviating Kori, § 53; Unterholzner, 1, B. S. 488-9-93-4; Burchardi, a. a. O. S. 130-40.

¹⁶ Thib. treatise on limitations, § 75; Schmidt, posthumous treatise, ed. Taselius, 2 V. n. 64 (German).

§ 1146.

Prescriptio
immemorialis.

Proved by wit-
nesses or
documents.

Jurament.
delatum.

The legal essential¹ of the immemorial prescription² is that the claimant have been in the same position uninterruptedly for a period whereof the memory of man is not to the contrary, whereupon he is held to have, and is treated as having, as good a right as though he had obtained it by a valid transaction; hence it follows that all rights, even those not susceptible of the definite prescription, such as royalties, can be acquired by this mode of prescription even without a title: it would appear, however, that bona fides is necessary,³ if the claimant⁴ has unreservedly exercised acts of ownership⁵ with respect thereto, whereof proof must be given, and the rebutting evidence met; the claimant proving by witnesses advanced in age (by which fifty-four years of age at least has been taken to be implied),⁶ who must all establish that the then state of things ever existed within their memory, and that a contrary or different state of things was never, to the best of their belief, known to their ancestors.⁷ The claimant may, moreover, be put on his oath,⁸ and documentary evidence adduced in support of the oral testimony, or to prove negatively or affirmatively that the then asserted state of things existed or did not exist *de facto* in the last generation or in that before it; rebutting evidence should prove that this state of possession has not existed beyond the memory of man, or at least not uninterruptedly; and neither an *interruptio civilis* or a *restitutio in integrum*⁹ can here come under consideration.¹⁰

§ 1147.

In English law
custom to be
distinguished
from prescrip-
tion.

With respect to English law, *custom*, which is *local* in its nature, must not be confounded with *prescription*, which is *personæ titulus ex usu et tempore substantium capiens ab auctoritate legis*;¹¹ it is the custom of a manor that it descend to the youngest son, is local; but a right of common of pasture, time out of mind, is personal, and therefore a prescriptive right.

Easements.

By the old Roman law, we have seen, services were not

¹ The writers on this subject are numerous. Ockel de Præscr. tempor. immemorabilis Alt. 1683; de Cocceii de P. J. Heidelb. 1706 (Exerc. T. 1, n. 39); Gasser de memorii initii contra, P. I. Hal. 1740; Kress de genuina nat. et indole vetust. Helmst. 1734 & 49; Schwartz de J. Gent. s. I. Lugd. B. 1749 and 52; Neller idea, P. J. (op. P. 1, T. 3), Puf. T. 1, obs. 151; Neustatel et Zimmern Untera. 1 B. nr. 5, 6; Kritze Abh. über Material. des C. R. Leipzig 1824, S. 146-231; Pfeiffer, pract. Aufsätze, 2 B. nr. 1; Dabelow takes a peculiar view, 2 B. § 110-125; contra, Kori, § 85.

² P. 43, 20, 3, § 4; P. 39, 3, 2, § 8; ibid. 26; X. 5, 40, 26; vi^{to}, 2, 13, 1; Golden Bull, 8, § 1, 2 & 28, § 5; Westph. Fr. Art. 4 & 9, § 2; Art. 15, § 2; contra

that of 1548, § 56, 59, 64, R. A. v. 1556, § 103; Unterholzner has declared his opinion against the practice, 1 B. p. 624-526, and Pfeiffer, a. a. O. p. 58-95.

³ Because the Popes term it *prescriptio*, from which it is inseparable in Canon law, Pfeiffer, l. c. p. 28-35.

⁴ Thib. l. c. § 75-9.

⁵ P. 22, 3, 28; Thib. l. c. 80-83.

⁶ Weiske quest. J. C. Zwickau, 1831, nr. iv. ⁷ Thib. l. c. § 84.

⁸ Puf. T. 2, obs. 55, though this is denied by Pfeiffer, l. c. p. 59-67, and Guenther princ. J. R. T. 1, § 330.

⁹ This is a much disputed question; Pfeiffer, l. c. p. 35-67.

¹⁰ Pfeiffer, l. c. p. 20-28, 95-98.

¹¹ Co. Litt. 113 b.

capable of prescription, but by the English law they are. Requisite prescription presupposes a grant; but what arises from a matter of record cannot be prescribed.¹ A right of way of ancient light, &c., may be acquired by prescription, and extinguished by non user, that is, the right may be negatived.

Immemorial prescription, at common law, is from time whereof the memory of man is not to the contrary, and such legal term still dates from the reign of Richard I.;² hence, if the right can be shown to have arisen since that time, the prescription when claimed at common law is destroyed,³ although evidence of commencement before that time would be of no avail:⁴ this period is termed that of legal memory; nevertheless, an enjoyment of twenty years generally amounts, at common law, even to a presumption of an ancient right, if no circumstance to the contrary be shown; the evidence may be documentary or by witnesses,⁵ as in the Roman law, and the whole evidence is for the jury; the intervention of which has rendered the decision of the English less certain than those of the Roman law.

Immemorial prescription.

§ 1148.

Legacy was one of the modes of acquisition mentioned by Justinian.

*Legatum est donatio quædam à defuncto relicta, ab hærede præstanda.*⁶

Legatum a mode of acquisition. Derivation and import of the word.

A legacy is one of the results of a valid will; thus, Ulpian says,⁷ *legatum est donatio, quæ legis modo, id est, imperative, testamento relinquitur*; *legare* signifies the same as *legis dicere*, or, as in Greek, νομοθερεῖν; for testators, as will be subsequently seen by the history of wills, spoke as legislators; hence *legare* is to command, consequently a legacy must be left *verbis directis*,⁸ for by the law of the Twelve Tables, precarious words invalidated the gift, which then became optional with the heir; a *fidei commissum* was a bequest left *mediately, verbis obliquis* to the legatee, but an inheritance or legacy was left *immediately, verbis directis*.

Is constituted by direct words of inheritance.

If left *verbis obliquis*, or *mediately*, it is implied that another shall first have it, or that it shall be ceded to him by such other person. But when left *verbis directis*, he who takes under such bequest may be a *successor universalis*, generally successor; or, *successor singularis*, particular successor. The *successor universalis* takes either the whole property or a *partem quotam*, se *partem per divisionem determinatam cum jure accrescendi*, and must, moreover, pay debts. Thus, if three heirs be named, each is *universalis*; that is, the survivor takes the part of the deceased co-heir by the *jus accrescendi* or right of survivorship; but the *successor singularis*

A fidei commissum is left by indirect words.

Successor universalis, and particular or singular. Universal successors have the *jus accrescendi*.

¹ Co. Litt. 114.

² Co. Litt. 115 a.

³ Mayor of Hull v. Horner Cowp. 108.

⁴ 9 Rep. 276; Com. Dig. Prescription Pract. lib. 2 c. 22; Stark Ev. 1205.

⁵ Stark, l. c. 1217; Co. Litt. l. c.; Rex

v. Jolliffe, 2 B. & C. 59; Hill v. Smith, 10 East 476; Daniel v. North, 11 East 372; Chad v. Tilsed, 2; Brod v. Bing, 403.

⁶ l. 2, 20, 1.

⁷ Frag. 24, 1; Nov. 22, 2.

⁸ C. 6, 23, 2; C. 6, 43, 15.

Not so the singular.

has his *emolumentum singulare*, consisting of one or many individual objects, or a determined *pars quota*, or *quanta hæreditatis*, whereout he pays no debts, but has no *jus accrescendi*, that is, though all the heirs die, he, nevertheless, does not become heir, such is a *legatarius*.

The legatee and heir differ from the trustee.

The *legatarius* and *hæres directus* there differ from the *fidei commissarius* or devisee, in trust, in this, that the two former take directly or immediately from the deceased, but the latter, indirectly or mediately through one or more hands, thus the direction to restore is the sign whereby a *fidei commissum* is recognisable; but in ancient times, when so much more importance was attached to forms of words, there existed also a difference in the *formula* of bequest, *hæreditates* and *legata* were left by words imperative, *verbis* termed *directis*, *civilibus*, *solemnibus*, *legitimis imperativis*; but as *hæres esto*, *hæres sit*, *hæredem esse jubeo*,¹ *F. Ca.*² by words implicative, *obliquis* or *inflexis*, ordinary expressions, *vulgaribus*, or precative ones, *precativis* or *precariis*, or of trust, *fidei commissariis*; and although they sometimes sounded very like a command, as *volo dari*, *mando*, *injungo*, *exigo ut des*, yet they were not for that less or other than words of trust, and equivalent to *fidei committo*, *desidero*, *cupio*, *precor*, *deprecor*.

Gradual relaxation of the formula.

Why strict adherence to forms originally indispensably required.

The natural tendency of the Roman state being, however, against forms for mere form's sake, the legal intent was justly held sufficient; in less civilized times there were several reasons for strict adherence to *formula*,—firstly, certain *formulae* had acquired an ascertained legal signification, and certainty was by such means obtained; secondly, by throwing a mystery around legal transactions, ignorant people respected the form with almost mysterious reverence, not daring to alter a word; indeed, a person ignorant of the principle ran as great a risk of altering a material as an immaterial one, of which we have abundant experience in the present day in pleadings, conveyances, and wills, when attempted by unprofessional persons; thirdly, the patricians thereby compelled their clients to consult them, obtained a certain insight into their private affairs, and kept them in a more perfect state of dependence. As, however, education extended itself, and the population and business increased, it was clear that the limited form of words could not be adhered to and all others held bad; thus the legal intent and force of a word, not usually adopted in the particular case, became a question for the court; but it was not until the time of Constantine the Great that they were formally abolished.

Constantine M. abolishes forms.

Subjective and

If the word *legatum* be used in a *subjective* sense, it imports a last will, wherein the person by imperative words is constituted *successor singularis*, or takes an *emolumentum singulare* directly from the testator, which is one and the same thing; but, when used in

¹ Vid. Höpfer, com. § 554, *sed post* different sorts of legacies.

² As the words *fidei commissum*, *fidei commissa*, *hæres fidei commissarius*, and *hæres fiduciarius*, will often occur, the contractions *F. C.*, *F. Ca.*, *H. F. C.*, and *H. F.*, will be adopted for the sake of brevity.

an objective sense, it imports the *emolumentum singulare* itself, left to a person by imperative words in a last will, and is properly termed *legatum*, between which and *F. C. particularibus* or *singularibus*¹ there was a great difference by the old law. By the later law *legatum* was in fact an *ex parte* testament, whereby a person is directly made heir of a particular thing.²

objective signification of Legatum.

Another difference was, that *legata* could originally only be left by testament, or a codicil confirmed therein, while a *fidei commissum* could be left in codicils not so confirmed, or in severe illnesses by a nod or sign, *nutu*, provided the testator had already made a will by parol.³

Legata how formerly left. How fidei commissum.

Lastly, legacies originally must be expressed in the Latin language, according to the set forms, which were interpreted according to strict law, but they could not be burdened with legacies; but bequests in trust might be in Greek, were interpreted according to equity, and could be burdened with both legacies and bequests in trust.⁴

Legata must be in Latin, F. Ca. might be in Greek.

The following will contains the different species of heirs :—

I, <i>Sempronius</i> , name <i>Titius</i> my heir, but he shall enjoy the inheritance for life only,	<i>Hæres directus</i> ; and, in this case also <i>fiduciarius</i> .
And on his death it shall devolve on <i>Mævius</i> .	<i>Hæres fidei commissarius</i> .
To <i>Seius</i> I leave my house, but he shall enjoy it for his life only,	<i>Legatarius</i> .
And on his death it shall devolve on <i>Caius</i> .	<i>Fidei commissarius singularius</i> .

§ 1149.

By the old law there were four species of legacies,—*vindicationis*, *damnationis*, *perceptionis*, et *sinendi modo*.⁵

The four ancient species of legata were—Per vindicationem.

The words of a legacy *per vindicationem* were *do, lego, sumito, habeto*,⁶ to which was added *illam rem tibi præsume vindica*. The legacy was then in the power of the legatee, who could take it as soon as the heir had administered.

A legacy *per damnationem* was bequeathed by the words,—*hæres meus damnas esto dare, dato, facito hæredem meum dare jubeo*. These were expressions similar to those used by legislators.⁷

Per damnationem.

Legatum per perceptionem was expressed, according to Ulpian,⁸

Per perceptionem.

¹ Ulp. fr. 25, Ib. P. 30 (1) 1, per omnia exequata sunt legata fidei commissis, said to be interpolated by Tribonian, vid. Höpfner, l. c. § 553, n. 1; Bynkershoek obs. lib. 7, c. 18; contra, Glück. Opusc. Fascic. 1, p. 200, sq.

² Modestinus, P. 30, 2, 36, and Justinian Inst. 2, 20, pr. term it *donatio a defuncto relicta*, which is an incorrect expression, for it is not in the nature of a contract donat. m. c.; P. 32, 3, 11, pr.; Ib. 21, pr.; P. 30, 1, 114, § 14; P. 31, 2, 77, § 27.

³ Some assert this as to legacies. Athanas,

Oteyza et Olano paralipam. et Elect. I. C. 2, 3; Meermann Thesau. tom. 1, p. 429.

⁴ Ulp. 24, § 19, for other differences, vid. Vinn. ad l. 2, 20, § 3, n. 2, sq.

⁵ Caius Inst. 2, § 193-222; Ulp. frag. 24, 2; Paul, R. S. 8, 7; Mylius, l. c. cap. 1, § 9, sq.; Westphal. § 16-22.

⁶ Caius Inst. 2, 5; Virg. Æn. 5, 533, et seq.; Serv. ad Virg. Æn. 12, 727.

⁷ P. 9, 2, 2, pr.; P. 9, 2, 27, 5; Paul. R. S. 1, 19, 1, and hence the *actio in duplum* for its recovery.

⁸ Frag. 26, 6 & 24, 11.

thus,—*L. Titius illam rem præcipito*, or *præcipito, sumitoti que habeto*, whence such legacy was called a *prelegatum* or *præcipuum*, commonly used among co-heirs,¹ and sometimes expressed by the capitals *P. S. T. Q. H.*

Sinendi modo.

Sinendi modo was another form of the *legatum per damnationem*, the words being,—*hæres meus damnas esto sinere L. Titium sumere illam rem sibi que habere.*² The heir was condemned to give, but the legatee at the same time permitted to take.

§ 1150.

How these modes obtained.

It is, however, important to observe why and how these different modes of bequest obtained. They arose in the nature of the things given, and of the parties to whom given.

Operation of the leg. P. V. on objects and parties.

Per vindicationem could be left, things over which the deceased at the time of his death, and of making his will, had control *jure quiritium*, which may be inferred as of course from the term referring to the old form of *manumissio per vindictam* *hanc ego rem ex jure quiritium meam esse aio.*

Operation of P. D. et S. M. on objects and parties.

Per damnationem and *sinendi modo*, all things would pass, even *alienæ*, sufficed only they were capable of being given,³ which could not be done *per vindicationem* or *per perceptionem*; and if one thing were given conjointly to one of many persons by *vindicatio*, the deficient part accrued to the other co-legatees,—but if, *per damnationem*, such part remained in the power of the heir, nor could such legacy be repudiated,⁴ which that *per vindicationem* could,⁵ for the latter supposes a sale, the former a judgment.

§ 1151.

Progressive abolition of these distinctions under Nero.

The first step towards the abolition of these distinctions was made by the *Sctum. Neronianum*, which, while it did not alter the forms, enacted that, if aught be left by another mode, it should only be valid as if left *per damnationem.*⁶

Under Constant. M.

Constantine the Great made a further change by assimilating the words but not the actions.⁷

Under Justinian.

Lastly, Justinian abolished also this last distinction,⁸ but overlooked the insertion in the Pandects of some laws which allude to this difference. This emperor, moreover, assimilated legacies and trusts to each other in nearly all particulars. In earlier times, however, the distinction was important, and a fruitful cause of dispute among the lawyers of that day.

§ 1152.

Ancient form of legacies, how affected by actions.

Before dismissing the ancient forms of legacies, let it be remarked, as far as the actions belonging to them were concerned, that a legatee *per vindicationem* became from the time the heir

¹ Val. Max. 7, 8, 4; Plin. Epist. 5, 7; Sidonium Epist. 6, 12; Cic. pro Mur. 12.

² Caius Inst. 2, 5, 9; Ulp. Frag. 245, ch. 6.

³ Ulp. frag. l. c.; Caius Inst. 2, 5, 6.

⁴ Merill obs. 6, 32.

⁵ P. 30, 1 (1), 7-44, § 1-86, § 2.

⁶ Ulp. frag. 24, 2.

⁷ C. 6, 23, 15; C. 6, 37, 21.

⁸ C. 6, 23, 1.

administered a *dominus quiritarius*, and was consequently entitled to a real action on the legacy; whereas, if by *damnatio* or *sinendi modus*, he had only his personal action against the heir founded on the will, but by *perceptio* a right *actionis familiæ herciscundæ* was given to the heir against the other co-heirs for this legacy.¹

The new law now abolished the difference between *legatis* and *fidei commissis singularibus*; theoretically, indeed, they are different, and cases arise in which the question of whether a bequest be one or the other becomes very important; of which Puffendorf gives an example.² A testator, who was a good lawyer, left 1000 aurei in words as follow:—

“If my heir die without children, 1,000 aurei shall revert to my next of kin, the brothers,” &c. The word “revert” made this a *fidei commissum*. The testator then made a new disposition, and revoked all legacies: these 1,000 aurei were held not revoked. The distinction between the four old modes also have only practical utility³ when a *genus* is bequeathed; and if the question as to who has the choice arise, it must be decided by reference to the form of words used by the testator,⁴ otherwise the rights and effects of legacies and trusts are similar.⁵

L. per vin. gave a right of real action.
L. per dam. vel sin. mod. a personal action only.
L. per percep. the action fam. herciscundæ.
Effect of the new law assimilating legacies and trusts.

Example.

§ 1153.

Legacies, bequests in trust, and inheritances concur in this, that whosoever can make a will, can bequeath a *legatum*, or erect a *F. C.*; ⁶ and on the contrary, whoso is under disability to make a will can direct neither the one nor the other.⁷ The same rule applies to acquisition,—thus, whoso are incapable of being heirs are likewise under disability to take a *legatum* or *F. C.*; ⁸ the only exception is that of necessary alimony,⁹ which may be left to an apostate. A legacy left to uncertain persons becomes good, if it can be made certain; likewise the poor, municipalities, *collegia licita*, and a *posthumus alienus*,¹⁰ are capable of legacies. But a legacy to the testator's slave lapses to his heir, except it be left of his manumission. Bad are legacies left to the universal heir, for as he takes all without that, it is supererogatory to leave such expressly.

Parties to legacies.
Who can legate.
Whocan acquire thereby.

§ 1154.

Nevertheless, when many heirs are appointed, and an additional legacy be left to one in particular, the legacy is good as a *prælegatum*. Thus, if the whole estate left to A, B, and C, amount to 9,000 aurei, and A has a prelegacy of 600, B and C take each 3,000 — 200 = 2,800; A, 2,800 + 600 = 3,400; that is,

The prælegatum.

¹ Merrill, obs. lib. 6, c. 32; Mylius, diss. hist. leg. c. 1, § 9, seq.

² Puf. obs. tom. 4, obs. 9.

³ Ulp. Frag. 24, § 11; C. 6, 37, 21; C. 6, 43, 1; Schlutting ad Ult. l. c.; Jan a Costa, ad l. 2, 20, § 2.

⁴ Merrill, obs. l. 2, c. 33; Vinn. 2, 20, § 22, n. 6; Stryk. int. contr. jur. c. 9, § 20.

⁵ Vinn. 2, 20, n. 4, 5; C. 6, 43, 2.

⁶ P. 30, 1, 2; ibid. 114.

⁷ Vid. post. Quibus permissum est facere testamentum l. 2, 12.

⁸ I. 2, 20, § 24; Thib. P. R. § 792-6.

⁹ P. 34, 1, 11.

¹⁰ By the old Roman law this was not so.

B and C pay him as *prelegatee*, and as it would be absurd that he should pay himself the remaining 200 aurei as a *legatum hæredi a se ipso relictum*, he retains it as heir; so when he has no collegetee; otherwise, it lapses to his collegetee¹ without regard as to whether the prelegacy was left with the formula, *præcipito*, or otherwise:² it is even so when a prelegacy is given to many co-heirs conjointly, in which case the portion which the co-heir should pay himself, in proportion to the amount of his share or interest, lapses as void to the collegetee.³ But if the prelegatee renounce as heir, the whole prelegacy assumes usually, quoad him, the nature of a legacy;⁴ but if he be involuntarily excluded, it only remains a legacy in so far as he would not have become his own debtor on his renunciation,⁵—that is to say, he loses all he would have taken as heir, although he gets the whole prelegacy as legatee when another heir is joined with him. A and B are joint-heirs, and it is directed that A give 100 aurei of his share up to B.⁶

§ 1155.

All can be
burthened with
legacies who
receive out of
an estate.

Whoso receives out of the estate⁷ of a deceased person can also be burdened with legacies and bequests in trust—not the heir alone, but also the *F. Cius.* and *legatarius*.

An estate is left to A, but he must pay the widow 1,000 aurei, *speciei legatur cum onere quantitas*; or 4,000 aurei is left to A, but he must give the widow his house, *quantitas legatur cum onere speciei*; A is left 1,000 aurei, but must give the widow one hundred measures of corn, *quantitas legatur cum onere quantitatis*. Now if this quantity or species directed to be paid exceed what is left, he may repudiate it;⁸ but if he accept it, he must pay the sum, though he be a loser thereby:⁹ if, on the contrary, he be directed to pay it out of the quantity or species left, semble he is a *F. Cius.* so far as the sum paid over¹⁰ extends, and a *legatarius* as to the share which remains to him after such payment. This was certainly the case by the old law.

Of many
persons.

A legacy may be imposed on many as well as on one person; when there is no provision respecting this arrangement, all the heirs are bound to contribute in proportion to their respective interests,¹¹ and are responsible *in solidum* if the testator have so directed; or, where the object is indivisible,¹² if he upon whom

¹ Voorda, interp. cap. 28.

² Contra, P. 30, 1, 67, § 1; Hofacker, T. 2, § 1480; sed vid. Pfeiffer, § 8-13; Westphal. v. Verm. I B. § 84; v. d. Pfordten, I. c. p. 71-9.

³ For exceptions vid. P. 36, 1, 55, § 3; P. 44, 4, 17, § 3.

⁴ P. 29, 4, 22, § 2; P. 30, 1, 17, § 2; C. 6, 37, 12.

⁵ P. 31, 2, 75, § 1; Voorda, interp. c. 27; Averan, id. L. 4, c. 5; contra, v. d. Pfordten, I. c. p. 52-5.

⁶ Thib. P. R. § 748, § 890; P. 30, 1, 17, § 2; ibid. 91, § 2; P. 34, 9, 18, § 2; v. d. Pfordten de præleg. Erlang, 1832; Pfeiffer de cod. Marb. 1798; Nieto de cod.

⁷ P. 35, 23, 75, § 1; Pfeiffer, § 8, 19.

⁸ P. 31, 2, 70, § 2; P. 32, 2, 114, § 3, 4; Westphal. § 97-140.

⁹ P. 31, 2, 70, § 1.

¹⁰ Vid. § 1148, h. op.

¹¹ P. 31, 2, 33, pr.

¹² P. 30, 1, 8, § 1; P. 32, 3, 11, § 23; ibid. 25.

the legacy is imposed fail, the heirs who succede into his place, and other subsidiary persons, are bound to pay the legacy.

§ 1156.

The next question relates to the things capable of legation, which may be *in esse* or *in posse*, corporeal or incorporeal, individual—belonging to the testator or a third party, but not to the legatee himself, for in that case the legacy is bad.

What things are capable of legation.

Things *in esse* or *posse*, corporeal or incorporeal, can be acquired by legacy, as the right of chase, right of tithes, a sum of money, debts due, and all other incorporeal things; the object must, however, be *in commercio*, quoad the legator, that is, he must himself possess the right of acquisition and of disposition over them; thus, a sepulchral monument being altogether *extra commercium* cannot be left, nor can the legatee demand its value; but four cases may arise,—either the object may not be *in commercio* at all—or not in that of the legator—or not of the testator—or not of the heir. The first is the case of *res sacræ* or *religiøsæ*,—whereupon Ulpian¹ says, *nam furiosi est, talia legata testamento adscribere*; the second case applies to the capacity of the legatee to acquire, as of a foreigner to receive quiritian property; many think² that the legatee cannot in this case demand the value, but the more cogent arguments oppose this opinion;³ in the third and fourth cases, if neither the testator nor the heir can possess the thing in property, but the legatee can, it appears that the legacy is valid.⁴

Things corporeal and incorporeal.

Things extra commercium, generally or particularly.

If A hire a house, and B subsequently buy it without knowledge of the legatee, who directs his heir to buy it for A, A cannot demand the value, *quia quod proprium est legatarii amplius ejus fieri non potest*;⁵ now, suppose A sell that house before the legacy become due, still the legacy does not revive, for the Catonian rule decides, that a legacy not valid at the beginning can never become so; but the heir can be directed, “that if A by reason of debt sell his house, he do buy it and return it to him,” for the Catonian rule does not affect conditional legacies.⁶

The own property of a person cannot be legated to him.

Things *in futuro*, wine, corn, the product of a mine, or of a slave, a child not born, or future product of all kinds, may be legated. If a crop not gathered in be left limited on a particular estate, and the crop fall short of the legacy, it is a question as to the construction of the will, for the estate may be mentioned *taxationis causâ* as a measure of value, in which case property may be taken *aliunde*, up to the amount usually so produced to make up the deficiency; not so, when mentioned *demonstrationis causâ*, whereby the legacy is limited to a particular estate pointed out.

Things future may be legated.

¹ P. 30, 1 (1) 39, 7.

² Vinn. Otto ad I. 2, 20, 4; Maianus disp. jur. tom. 1, p. 351; Cocceii, jur. con. ht. qu. 14; Walch, com. p. 238, seq. ed. 3.

³ Beaufin, disp. ad P. 30, 1, 40; Branchu, oba. adj. r. p. 179; Püttmann, adverb. 1, 3; P. 30, 1 (1), 114, § 5 & 40 (1).

⁴ P. 31, 1 (2) 49-3.

⁵ I. 2, 20, 10.

⁶ P. 34, 7, 1, § 2; I. 2, 20, § 10; Vinn. et Otto ad id. if the testator leave the legatee a thing erroneously believing it belongs to him already, the legacy is good, I. 2, 20, § 11.

The property of others could be left.
The question of error of proprietorship.

Not only the legatee's own property, but that belonging to another could be left: If it appear the testator erroneously thought it belonged to himself,¹ the legacy is bad, for he would, it may be implied, not have so disposed of it had he been aware of the true state of the case;² but if he did know it, then his intention was that the heir should purchase it and deliver it to the legatee; in the first case, that of error, the testator cannot be supposed to have intended to burden his heir with the purchase of a thing from another; in the latter case, it is clear he did: now, if the object cannot be bought up,³ or only at an extravagant price, then the legatee has a claim to the fair value, and it may have belonged to the testator jointly with another; but if it be⁴ doubtful whether the testator was, or was not aware of the true state of the fact, then the *onus probandi* lies on the legatee.⁵ Now, let the legatee be supposed to have had the object given to him, *titulo lucrativo*, in the lifetime or after the death of the testator, the legatee then has no claim, for the object aimed at by the testator, viz., that the legatee should get it for nothing has been attained, and *duæ causæ lucrativæ in eundem hominem et rem concurrere non possunt*;⁶ on the contrary, if the legatee shall have bought it, *titulo oneroso adquisivit*, then he can claim the value, for the intention of the testator was that he should have it, *titulo lucrativo*, without charge.⁷

Things pawned could be legated.

In the case of a thing pawned left as a legacy, if no mention or proof of the knowledge thereof on the part of the testator can be given by the legatee,⁸ he must himself redeme it; on the contrary, being proved by him, the heir is bound thereto; and generally, if the object of a legacy be lost, or perish without fault of the heir,⁹ the legatee bears the loss; if, on the contrary, the heir be to blame that the loss occurred, then he must indemnify the legatee.

§ 1157.

The modes under which legacies may be made.

We now pass to the different modes in which, and circumstances under which, a legacy may be left. These may be distributed under the following heads:—

Legata	{ <i>Liberationis.</i>
	{ <i>Nominis.</i>
	{ <i>Debiti.</i>
Prælegatum . . .	{ <i>Dotis.</i>

¹ P. 31, 1 (2) 67, 8; Gottschalk, de leg. rei alienæ.

² I. 2, 20, 4; C. 6, 37, 10.

³ X. 11, 5.

⁴ P. 30, 1 (1), 30, 4 (3), 68; P. 32, 1.

⁵ P. 22, 3, 21; I. 2, 20, 4.

⁶ P. 44, 4, 17; Maianaii, disp. de prohib. con. lucratio. caus.

⁷ P. 30, 1 (1), 82; P. 50, 16, 88.

⁸ P. 30, 1 (1) 57; H. Donell. com. jur. civ. 8, 19; vid. Vinn. et Heinec. ad I. 2, 20, § 5.

⁹ I. 2, 20, § 16.

Legata	{	<i>Dotis.</i>
		<i>Speciei.</i>
		<i>Partitionis.</i>
		<i>Generis.</i>
		<i>Optionis.</i>
		<i>Quantitatis.</i>
		<i>Pura.</i>
		<i>Conditionata.</i>
		<i>In diem.</i>
		<i>Ex die.</i>
		<i>Sub demonstratione.</i>
		<i>Sub causâ.</i>
		<i>Sub modo.</i>
		<i>Captatoria.</i>
		<i>Pænæ nomine.</i>

The first three apply to incorporeal things. If the right to a debt due be left, it may be active or passive. An active debt is one to be received; a passive debt, one to be paid. In the first case, that is left which the legatee or the testator's heir has to receive,—this is termed *legatum liberationis*;¹ but if it be the sum due from a third, it is called *legatum nominis*. Thus, in the first case, A leaves B a debt which B owes to A; in the second case, A leaves B a debt which C owes to A.

Legatum liberationis nominis and debiti, what.

A passive debt is one due from the testator to a party. For A to leave B the debt A owes to C is absurd, but the legacy to a man of the amount of a debt owing to himself is a *legatum debiti*.

§ 1158.

The operation of the *legatum liberationis* is, that the heir must return the legatee his acknowledgment; but if the heir do not so, but sue him, the legatee defends himself by an *exceptio doli*.²

Legatum liberationis.

Temporary exemption will only protect for a period fixed, stopping the interest in the mean time;³ a correus or co-defendent, however, derives no advantage from the legacies.⁴ But if, in the case of the *legata nominis* or *liberationis*, there exist in fact no claim, both are inoperative when no particular sum is mentioned; if otherwise, the *legatum nominis* is void, although the *legatum liberationis* is good, but bad when a *non petere*⁵ only is imposed upon the heir. Other rights can be legated, such as an usufruct even of the whole estate.⁶ This, however, gives the legatee no right on the substance of the object, save when a contrary intention

¹ P. 34, 3, 8.

² P. 34, 3, 3, § 3, 4, 5; *ibid.* 4 & 8.

³ P. 34, 3, 8, § 2.

⁴ P. 30, 1, 8, § 1; *ibid.* 44, § 6; *ibid.* 105; P. 46, 1, 71.

⁵ P. 30, 1, 75, § 1, 2; P. 34, 3, 7, § 2; *ibid.* 25; for various views *vid.* Thib. P. R. § 905, n. n. *ibique citat.*

⁶ C. 3, 33, 9; Bauer de leg. usufr. Lips. 1795.

of the testator is evident, as when he has legated an object to be used.¹ It is curious that when the object is left to one, and the usufruct to another, both divide the usufruct in case of doubt.²

§ 1159.

Legatum
nominis gives
right of an
actio :

utilis.

Legacy paid
before death
is lost.

The *legatum nominis* gives the legatee a right of action against the debtor of the testator by a species of power of attorney, for by the old law the action was not maintainable by the legatee until he had obtained a cession of right of action from the heir, who was supposed to be one person with the testator ; but by the new law the legatee had a right of suing *utiliter*.³

Now, if active debt left as a legacy be paid to the testator before his death, either when debtor is the same person with the legatee or when he is a third party, the legacy is tacitly illuminated ; in the first case, if the testator had given the debtor notice to pay from necessity, as if he doubted his solvency or the like ; on the contrary, it is not lost if the notice be given not from necessity, for it is presumed that such notice from necessity was given with the intention of revoking the legacy, *animi adimendi legatum*.⁴

§ 1160.

Legatum debiti.

Annihilates the
condition and
terms.

Gives a hypo-
thec,

and a real
action,

and facilitates
the proof.

A debt can also be left ; this is called *legatum debiti*, and in order that the legacy may be effective the legatee must derive advantage therefrom, *plus sit in legato quam in debito*. It may be a debt due to the legatee by the heir or by a third party ; such legacy is valid in case that it does not come under the exception of the penalty attaching to a neglected inventory, and that he upon whom it is imposed have something left him.⁵ For if A leave B the debt he owes him, he has no greater advantage than he would have as a creditor of the estate ; but if the testator owed the legatee a debt *sub conditione* or *ex die*, and leave it him *pure*, he gains an advantage by the obliteration of the condition or period of payment. In this case the real thing left is the remission of the existing condition or term ; of course the debt must be a legal one, not arising out of a gambling transaction or excessive usury.⁶

The advantage may consist in the security, for the legatee may then obtain a hypothec, whereas as creditor he had a mere right of personal action against the testator and his heir, which is thus changed into a real action available against the possessor, whoever he may be.

Another advantage lies in the facility of proof which may be

¹ Lauterbach, coll. L. 33, T. 3, § 4 ; Leyser, sp. 384, m. 1 ; Voet. 7, 1, § 9-13.

² Leyser, l. c. m. 3 ; Müller, obs. 603 ; contra, Voet. l. c. § 8, 17 ; Francke, obs. de jur. leg. et F. C. sect. 1, Jen. 1832, p. 10-16 ; Knoetscher, de us. hod. L. 19, de us et usufr. et red. Lips. 1793.

³ C. G. Haubold (Res. Laurent.) de legat. nom. ; I. 2, 20, § 21 ; P. 30, 1, 44, § 6 ; ibid. 75, § 2 ; C. 6, 37, 18.

⁴ I. 2, 20, 21 ; P. 34, 3, 21, pr. ; P. 32, 1 (3) 11, 13 ; I. 2, 21, 23.

⁵ I. 2, 20, 14.

⁶ P. 33, 1, 3, 6 ; P. 30, 1 (1), 55.

thus derived from the will, and that, even though the sum left be greater than what is due, for such was the will of the testator; but, to gain this last advantage, a fixed sum must have been mentioned in the will;¹ but if this have not been done, it does not operate even to allow the legatee to be admitted to oath.² If a testator legate a sum never so great to his creditor, without specifying it to be a *legatum debiti*, it is not so, and the legatee receives his legacy without being excluded from the right of proving his debt against the estate as well.³ An exception lies when the claim of the legatee has for object to invalidate the act of the testator. Is this so, he must forego it so far as the legacy indemnifies him.⁴

§ 1161.

Prælegatum dotis is a legacy to a wife of the dower she brought,⁵ and is a species of *legatio debiti*: the advantage of this legacy⁶ is, first, that the widow can demand the sum at once, for which she would otherwise have to wait a year, if the dower consisted of furniture, ready money,⁷ &c.; secondly, that the expense incurred on the dotal object by the testator, necessary ones excepted,⁸ as repair of buildings and the like, cannot be charged⁹ to the widow; thirdly, that when a fixed sum is mentioned as the amount of the dower, the widow receives such sum though it exceeds the sum she actually brought, nay even although she should have brought nothing. This legacy also is a sufficient proof to the heir of the actual sum she brought, though it is not so as against creditors.¹⁰

Prælegatum dotis, advantages of.

§ 1162.

Legatum dotis differs from the above; for it is the appointing a dower by way of legacy to a third party,¹¹ or the legacy of a thing as a future dower; it is otherwise called *dos relegata*, and is also a species of *legatio debiti*, but it must in doubtful cases be considered as a conditional legacy, when it is not determined that it can be given at once, and that it is only applicable to the end of marriage, for *dos non intelligitur sine nuptias*.¹²

Legatum dotis appoints dower to a third person, or in futuro.

§ 1163.

The same signification is attached to *species* by lawyers, as to *individuum* by philosophers, that of a fully determined existing object.

Legatum speciei.

¹ Vinn. ad 2, 20, 14.

² I. 2, 20, § 15.

³ P. 37, 7, 4; C. 5, 13, 1, § 3.

⁴ P. 24, 3, 22, § 3; Alef. de leg. cum deb. non compen. Heidelb. 1751; Hellfeld, Jur. for. § 1453; Bauer, an leg. a deb. compensat. præsumpt. indicat. Lips. 1762.

⁵ P. 33, 4; Martens de præleg. dot Franc. 1731; v. Tigerström, dotalr. 1 B. p. 311-27.

⁶ P. 33, 4, 1, § 1, 5, 6, 7.

⁷ Ibid. 1, § 2.

⁸ Ibid. 5.

⁹ Ibid. 1, § 4; Glück. P. 27, B. p.

422-26.

¹⁰ Vid. § 1105, h. op.

¹¹ P. 33, 4, 1, § 10; Ibid. 7, pr. & 11.

¹² P. 2, 14, 4, § 2; P. 23, 3, 21; Fachinei, contr. 5, 48; Stryk. cant. test. 20, 35; Lauterbach, coll. th. pr. tit. de dote præl. 5; Voet. ib. n. 3; Thib. P. R. § 907, n. r.

The Pandects contain a series of titles of individual things which can be legated, but they are for the most part of an etymological character, as follow:—*De servitute legato*; ¹ *De tritico, vino, et oleo legato*; ² *De instructo vel instrumento legato*; ³ *De peculio legato*; ⁴ *De penu legata*; ⁵ *De suppellectile legata*; ⁶ *De auro, argento, mundo, ornamentis, unguentis, vestimentis, et statur legatis*.⁷

Responsibility
of the heir for
culpa.

If such *species* be lost by the slightest degree of fault on the part of the heir, he is answerable; thus, Ulpian⁸ says, *culpa autem qualiter ut æstimanda videamus. An solum ea, quæ dolo proxima, verum etiam ea quæ levis sit*; but if the house be burned down, or the animal die, it is an *actus Dei*, nor is the heir responsible if he have delivered the object within the proper term; but if not, *si in morâ sit*, he is liable: thus, Ulpian continues, *an numquid et diligentia quoque exigenda est ab hærede, quod verius est?*⁹

Accessory
things.

If two distinct things be left, and one be lost, the remaining one can be claimed. And if one be accessory to the other, and such accessory be lost, as the saddle of a horse, the horse may be claimed; but if the horse, as principal, be lost, the saddle follows him.

Universitates.

A collective thing, such as a swarm of bees or herd of cattle, called *universitates*, may be left; if such *universitas* increase in the testator's lifetime, the legatee certainly has the benefit of it, for the legatee obtains a vested interest first on the testator's death; but if this increase take place subsequently but before administration, it may arise either from *internal* circumstances, as by breeding, in which case the legatee has the benefit,—not so, if it be an addition, that is, arise from *external* circumstances, as by an accession through a slave, for this accrues to the heir;¹⁰ but if the herd be reduced to one, the legatee must take it as he finds it, for it is still a herd although reduced to one, for *si ad unum redigatur stet nomen universitatis*; besides, to him to whom the *universitas* is left, is left also each individual constituent part thereof.¹¹ But can any change after the testator's death alter the case? the legacy vests in the legatee, such as it is, at the moment the testator dies; thus, there is no time for any change to take place.

§ 1164.

Legatum partitionis.

Legatum partitionis is where a *pars quota* of the inheritance or property *partem hereditates sive bonorum*,¹² and such a legatee is called *partiarium*, such legatees have much similarity with heirs, but are not so, for they have not the *jus accrescendi*; if a co-heir

¹ P. 33, 3.

² P. 33, 6; Roth de vini novi legato, Jena, 1676; Gruner de camo zithi sive cervisiz leg. vet. spec. ad dig. loc. dub. Jen. 1805.

³ P. 33, 7; Westph. § 374-488.

⁴ P. 33, 8.

⁵ P. 33, 9; Westph. § 647-69.

⁶ P. 33, 10.

⁷ P. 34, 10; Westph. § 524-623.

⁸ P. 30, 1 (1), 47, 5.

⁹ Voet. ad Pan. tit. de leg. n. 50; Cocceii, jur. contr. eod. tit. qu. 25.

¹⁰ I. 2, 20, 20.

¹¹ I. 2, 20, 18, 19, 20; P. 30, 1 (1) 22.

¹² Voorda & Westphal.

fail, or if only one heir be instituted and fail, so that the testament is *destitutum*, the *legatarius partiaris* gets nothing; he is not a *successor juris*, with right of hereditary actions, or liable thereto. Inasmuch as the amount of his share, however, depends upon the payment and receipt of debts, the *legatarius partiaris* and heir give caution called *stipulationes partis et pro parte* to each other reciprocally: the heir, that the legatee shall have his share of active debts collected; the legatee, that he will pay his share of passive debts, should such be discovered.¹

Security by heir and legatee.

This legacy took its origin in the obligation of the heir to keep up the private sacred rights² of the family he represented; to avoid which burden, instead of naming the party heir, he was named partituary legatee, *ne sacris allegaretur*.³

Origin of this legacy.

The introduction of Christianity naturally rendered this fiction unnecessary. D'Arnaud's⁴ conjecture is, however, that this legacy was intended to evade the *lex voconia*, which prohibited women to be instituted heirs; this species of legacy was, however, never formally abolished.⁵

If a testator express himself thus,—“I leave one-third of my property to A”—is he an heir or a legatee? Stryk thinks the latter.⁶ Can there exist a reasonable doubt of it, the question is, however, moot.⁷

§ 1165.

Legatum generis differs from the *legatum speciei*, as *genus*, which is the *similitudo individuorum*, differs from *species*; this legacy has no force, and is useless where the genus is too general, called by moderns, *genus summum*, as in case of a “beast” being left; but if it be further restricted, it may be good, termed *genus infinium*, as when an ox, cow, or saddle-horse is left, for these, however bad, have yet at least some worth; if the designation be “one of my horses,” the legatee can demand one of such and receive none other; but if there be none among the deceased's goods the heir chooses, but must not give the worst of the description specified;⁸ but if there be many such horses, and the heir has an express power to assign, he may assign the worst;⁹ the reverse if liberty of choice be left to the legatee, who may choose the best; but if it be left open, “to A I leave one of my saddle-horses or books,” then it appears that a middle course will be taken, and the best

Legatum generis.

What can be claimed under.

¹ Ulp. Fr. 24, § 25; 25, § 15; I. 2, 23, § 5; Theophilus, paraphr. ibid. 23, 26, § 2; P. 30, 1, 27 & 104, § ult.; P. 28, 6, 39, pr.; P. 36, 1, 22, § ult. Conflicting opinions, Arnaud conj. 1, 1, 2; Voorda, de leg. part. Conradi Disp. sup. leg. part. Lips. 1756; Löhr. Mag. 4, B. 1, S. 93.

² Schwarz, diss. de sacr. detestatione, § 6, sq. (in dissert. ael. num. 11).

³ Cic. de leg. 1, 20.

⁴ Var. conj. 2, 1 & 2; Contius, lect.

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subsec. 2, 12, off. p. 92; Westphal. von Vermächtnissen.

⁵ Chaplet, tr. de fidcon. 2, 4, in Thesau. Ottor. tom. 5, p. 789; Jac. Voorda, diss. de leg. part.; L. Conradi, diss. super. leg. part. Lips. 1756.

⁶ Cant. test. 16, 16.

⁷ Struben, rech. Bed. III. 15.

⁸ P. 30, 1 (1), 71, pr. & 110.

⁹ P. 33, 6, 3; Gebauer, diss. de op. leg. 3, in opusc. tom. 1, p. 424.

must not be (if there be two similar) taken by the legatee who has the choice,¹ but an average one.

Things in
genere may be
incorporeal.

A legacy of incorporeal things may be of those general or special, and may be of one or more individual things of a genus, which is good, if not bad, for too great generality, or where an equitable interpretation can be laid on the legacy;² thus, a *legatum dotis*, as of the expense of study, is good.³ Under this head may also be placed a *legatum partitionis*, or of an imaginary part of the whole estate, in which case the rights of the testator, quoad a certain part, pass to the legatee free from the debts.

§ 1166.

Legatum
optionis gives
the legatee the
right of choice
which,

Legatum optionis is where the legatee has the right of choice, otherwise termed *electionis*,⁴ which occurs in cases of general and alternative legacies. In cases of doubt the legatee and his heirs have the choice, without reference to whom the words are directed, or as to whether the objects be in the estate or not;⁵ the legatee in cases of doubt, however, not permitted to choose the best,⁶ which he is in the case of an alternative legacy.⁷

once made,
cannot be dis-
turbed.

If, therefore, the testator have allowed the right of option or election, it holds good, and the legatee or his heir⁸ can in such case choose the best,⁹ but he must do so in person and not by attorney,¹⁰ within the term allowed by the testator, or assigned by the judge for such purpose;¹¹ consequently, if he die before choice made, the legacy lapses. Justinian extended this to the heir of the legatee, but the choice once made, such election could not afterwards be disturbed by his heirs.¹²

The legatee
elects on the
refusal of a
third party.

If a third party have the power of election for the legatee, but who cannot or will not elect, the legatee steps into his place, but is not in such case permitted to choose the best;¹³ the same when the heir is appointed to elect, but does not decide within the given term,¹⁴—he must not, however, choose the worst,¹⁵ and lot rules the division when many appointed to elect cannot agree.¹⁶ If a legacy be indeterminate of many objects, the worst only can be assigned to the legatee.¹⁷ When many things of a genus are legated but

¹ P. 30, 1 (1), 37, pr.; Vinn. ad I. 2, 20, 22, n. 1, 2, 3.

² I. 2, 20, § 22; P. 30, 1, 11; P. 33, 6, 3; Averan, int. 4, 14; Thomasius, de prom. rei insert. § 35; Gebauer, de op. leg. cap. 3; Biedermann, de leg. ger. sec. jus com. et boruss. Brand. Hal. 1794.

³ Leyser, Sp. 386; Müller, obs. 604; Thib. l. c. § 904 & 912.

⁴ Gebauer, de opt. est elect. leg. (op. T. 1); Westphal, on individual legacies, § 1-18 (German).

⁵ I. 2, 20, § 2 & 22; Thib. Versuche, 1 B. p. 16, 27; contra, Höpfner, l. c. § 569; Gebauer, l. c. § 2, 3, on P. 30, 1, 20, 32, § 1, 71, pr. 80, § 3, 108, § 2; P. 36, 6, 4; P. 33, 5, 2, § 1; P. 34, 4, 11-

12; sed quære, thing only not belonging to testator, Francke, obs. de jur. leg. et F. C. Sect. 1, Jen. 1832, p. 1-9.

⁶ P. 30, 1, 37.

⁷ P. 30, 1, 34, § 14; P. 31, 2, 23.

⁸ I. 2, 20, § 23; C. 6, 43, 3.

⁹ P. 35, 5, 2, pr.; P. 4, 3, 9, § 1.

¹⁰ P. 50, 17, 77 & 123, pr.

¹¹ P. 35, 5, 6 & 8, pr.

¹² P. 30, 1, 11, pr.; Lauterbach, coll. th. pr. tit. de op. leg. § 35; Vinn. ad I. 2, 20, 23; Andreæ de leg. opt.

¹³ C. 1, 6, 43, ult. § 1; P. 33, 5, 21.

¹⁴ P. 31, 2, 2, 11, § 1; P. 30, 1, 37.

¹⁵ P. 30, 1, 110.

¹⁶ I. 2, 20, § 23; C. 6, 43, 3.

¹⁷ P. 30, 1, 39, § 6.

indeterminately, the legatee may demand three.¹ And it is generally a rule, that when the heir has the choice in the case of a genus, he cannot assign to the legatee any object which the latter has acquired by other means, and has subsequently alienated.²

§ 1167.

Legatum quantitatis, as far as its abstracted sense is concerned, resembles *generis*, *quia genus et quantitas non pereunt*, in which respect it is more valuable than the legacy *generis*; for if the bushel of corn be specifically left, and the barn be burned, the legacy is lost,—not so if a bushel of corn be left, generally *quantitate et genere*. Legatum quantitatis.

§ 1168.

Legatum facti, a *factum*, may be left as well as a thing, if not morally or physically impossible, for then the heir is excused; for instance, a testator may command his heir to teach a certain person some science of which the heir is cognisant.³ Legatum facti.

§ 1169.

A legacy may be left purely and unconditionally, or *conditionata*, otherwise *legatum conditionale*, conditionally, or under a condition, which may allude to time, description, cause, or manner. Legatum conditionale.

A conditional legacy differs from a conditional institution of an heir,—in this, that the prætor will in certain cases of *conditionis pendentis* grant such heir administration, but the legatee has no claim for his legacy, but must bide the event,⁴ with the exception that if it be likely the condition may or must last all his life, he may obtain the legacy on offering the Mucian caution; for instance, A leaves B a house, on condition he live all his life at Rome. Resolutive conditions, although without force in institutions of heirs, are not so in cases of legacies.⁵

§ 1170.

A legacy may also be left *in diem*,—that is, to receive weekly, monthly, or daily, *during* a certain period, termed also *annua*; here, the sums due on the first term are considered as unconditional, those due on the following terms as conditional.⁶ But if an integer be bequeathed, and the terms of payment only deferred, the legacy is unconditional.⁷ Legatum in diem.

§ 1171.

Ex die is such legacy as is to take effect *after* the lapse of a given time, and is equivalent to an unconditional one, and the right accrues when the day arrives.⁸ Legatum ex die.

§ 1172.

Legatum sub demonstratione consists in a description applying Legatum sub demonstratione.

¹ P. 33, 5, 1.

² P. 31, 2, 66, § 2-3.

³ P. 30, 1(1), 112, § 3, 113, § 5, 114, § 14.

⁴ P. 36, 3, 4.

⁵ P. 35, 1, 107; P. 36, 2, 6.

⁶ P. 33, 1, 4.

⁷ P. 33, 1, 5; P. 36, 2, 12, § 4, Id. 205.

⁸ P. 36, 2, 5, § 1, Id. 21; P. 35, 1, 75.

Gottschalk, disc. forens. I. 3, nr. 3; P. 36, 1, 46; Westphal. I. c. 2, V. § 1851.

to the thing left; should, however, such description be defective, but the identity of the object proved, this defect is not material, nor even in that of the legatee, on due proof of the identity of person.

1173.

Legatum sub causa.

False cause does not avoid legacy.

Legatum sub causâ is where a cause is stated by the testator wherefore he leaves the legatee the legacy; nor will the fact of such cause proving false vitiate it, for a will is a law, and a law is not the less binding so long as it remains unrepealed, because founded on a false basis. It is, however, open to the heir to prove that the testator left the legacy for the cause stated, that he believed such cause to be true, and that, had he not done so, he would not have left it to the legatee; if he succeed in such proof, he may plead the *exceptionem doli* as an answer to the demand of the legatee for payment, *falsam causam legato non obesse, verius est, quia ratio legandi legato non cohæret*; sed plerumque *doli exceptio locum habebit, si probetur alias legaturus non fuisse*.¹

§ 1174.

Legatum sub modo requires the performance of a condition precedent.

Legatum sub modo,—this is otherwise called *modale*, and very similar to a conditional legacy, from which it, however, differs, inasmuch as a conditional legacy requires the performance of a condition precedent, a modal legacy of a succedent. *Ex gr.*:—"A leaves B 1,000 aurei if he buy C.'s house,"—here he must buy the house before he can touch the legacy; but if the condition run, "A leaves B 1,000 aurei to buy C.'s house," it is a modal legacy; and this has a further effect, for, as the conditional legacy supposes a condition precedent, no right is transmitted to heirs till such condition be fulfilled, which is not the case in the modal legacy, for there the performance of the condition depends on the receipt of the legacy: it is true, such legatee is liable to subsequent forfeiture on refusal to perform such subsequent condition.²

Now, none can force the fulfilment of the *modus*, if he have not a vested interest:³ if one leave a sum of money *sub modo* of purchasing a house in which a third person is to have free lodging, such party can compel the fulfilment of the *modus*.

§ 1175.

Legatum captatorium is illegal.

Legata captatoria, or *captatoriæ dispositiones*,⁴ were invalid. They consisted in a reciprocal agreement between two parties to institute each other heirs or legatees.⁵ This arose from their

¹ P. 35, 1, 72, § 6; C. 6, 24, 4; C. 6, 44.

² Greg. Maiansius in diss. de hic quæ sui mod. relinq. 9, in coll. diss. tom. 2, n. 41; Leyser, sp. 399.

³ P. 32, 1 (3), 19; P. 35, 1, 71, pr.; P. 40, 4, 44.

⁴ Thomasii, de capt. inst. coll. diss. tom. 2, diss. 32; Bynkershoek, de capt. inst. c. 10, in opusc. Halen, vol. 2, p. 2, 34, seq.; Thibaut, Versuche, 1 B. l. 4.

⁵ P. 28, 5, 70-71, pr. § 1; ibid. 81, § 1; P. 28, 7, 20, § 2; Thib. P. R. § 954, n. b.

being in Rome a class of swindlers called *hæredepetæ*, or "inheritance cadgers," who, having concluded such reciprocal condition, either subsequently altered their will, superseded it by a later one, or made away with the other party; for this all such dispositions, applying either to heirs or legatees, were declared void. Some difficult points, however, arose on this head;¹ but these must not be confounded with *testamenta reciproca*.² Nevertheless, if the legatee commit any infringement, it by no means involves avoidance, if it be not captatorial, or originate in an excusable misconception of the law.

Hæredepetæ.

§ 1176.

The *legatum pœnæ nomine relictum* were invalid, as depending upon the caprice of the heir, a *conferri in arbitrium hæredis*, which, as the testament was a law, was not legal;³ but Justinian decreed such legacies should be binding if the condition were legal, invalid if not so. As, "My heir shall beat A, or pay a given sum to the poor,"—here the heir would neither pay nor administer the beating to A; otherwise, if he be commanded to marry,⁴—here the heir must pay the penalty of marriage, or forfeit.

Legatum pœnæ nominis legal if condition is so.

§ 1177.

The *jus accrescendi*, or right of survivorship, is equally applicable to legacies, which are particular successions, as to wills, which are universal successions, the legatee taking the share of the *collegatarii conjuncti*, which such co-legatee had then not acquired; the main difference in the operation of the *jus accrescendi* in wills and legacies is, that in the first case the testator has no power of direction in this respect; in the latter he has; for if he choose to forbid the action to the co-legatee, it does not injure the inheritance, nor make the testator part testate and part intestate, for such share, if it go not to the co-legatee, devolves *de jure* on the heir.

Jus accrescendi applies to legacies.

To make the *jus accrescendi* in legacies available, there must exist co-legatees for the same thing, which is not really divided; one of the co-legatees must fall away, and such co-legatee have not acquired his share at the time; now the testator is held to have made a division, if he can distinguish and at once separate such part without further ado, either in word or in deed, as leaving one-third to one and two-thirds to the other, and this will not vitiate the conjunction;⁵ but if there be no conjunction, there is no legatary creation.

How made available.

¹ Bynkershoek & Thomasius, Leyser, 376, 10; Müller ad Leyser, tom. 4, Tit. 1, obs. 582; Nov. Theo. et Val. tit. 4.

² P. 28, 5, 70-71; P. 29, 6, 3.

³ P. 30, 1 (1), 43; Theoph. et Vinn. ad I. 2, 20, 36.

⁴ Bynkershoek, Beckmann, diss. de leg.

pœnæ nom. relict. § 26; Sammeb, ibid. in opusc. p. 41, seq.

⁵ Vinn. I. 2, 20, 8, n. 15; Donell. com. 7, 13 & 8, 21; Script. Gentilis de jur. accr. 6; P. 32, 1 (3), 89; P. 50, 16, 142; Cocceii, jur. contr. tit. de legat. sect. de jur. accres. 94; Bach. de jur. acc. 14, in opusc. p. 35, & l. c. § 18.

§ 1178.

Lapsed legacies.

A legatee *deficit* falls away, that is, the legacy is lapsed when the legatee cannot or will not accept the legacy; for instance, if he die before the testator, or before the making of the testament, a legacy accrues to him when he refuses to accept it, or when at the time the legacy was left him, or subsequently, he have lost his faculty of inheriting; in short, when the legacy has been declared *pro non scripto*, *caducum*, or *quasi caducum*; when a legatee capable of the legacy outlives the testator, but dies after the *cessio diei* (of which hereafter), the co-legatee has no cretion, for the deceased had come into possession of his share which then passes to his heir.¹

§ 1179.

The vesting of legacies.

And now it remains to consider two important questions with respect to the vesting and possession of legacies,—firstly, from what period a *right* to the legacy accrues to the legatee? and secondly, at what period he can demand its *delivery*? and thirdly, from what time the *right of possession* accrues? The Roman lawyers expressed the first position by *quando dies legati cedit et venit*; *dies cedit* signifies that the legatee has acquired a right so perfect as to be transmissible to his heirs; *dies venit* that he can exercise such right; now, if a legacy have been made payable two years after the decease, *dies cedit* on the death of the testator, *sed nondum venit*.

Dies cedit et venit.

Rules by which this maxim is regulated. Unconditional legacies vest on the death of the testator.

To ascertain when these two events happen, the following rules have been laid down :—

Per damn. percept. et sin. modo, on acceptance and admin. by heir.

A legacy left unconditionally, *pure et sine die relictum*, vests upon the death of the testator, because the heir might delay to administer; for Justinian² reformed the old rule, that the right vested upon the administration of the heir; the Pappian Poppæan law, however, provided that *legata per vindicationem* should vest on the opening of the will,³ and in those *per damnationem*, *perceptionem*, and *sinendi modo*, later still, viz., on the acceptance and administration of the heir;⁴ moreover, if a legatee died between the making of the will and its opening, or before administration, the legacy fell to the fiscus; this Justinian altered likewise, as above. Hence it suffices that the legatee outlive the testator for ever so short a time, in order to transmit the right to his heirs and gain a claim of interest and product from the date of the testator's death.⁵

Exceptions.

Exceptions exist in the cases of a slave freed, *legatum libertatis*, and of personal services, as *usufructus*, *usus*; *habitationis*, where the vesting of the legacy dates from the administration of the heir; because, in the first case, the slave having become free on the death of the testator, and the heir subsequently declining the

¹ C. 6, 51, 1.² C. 6, 51, 1; Boehmer, diss. de diff. leg. pur. et non pur. 6, seq. ex ad Pand. tom. 5, p. 166, seq.³ Ulp. Frag. 24, 31.⁴ Heinec. ad Jul. 3, 7, 4.⁵ C. 6, 47, 1 & 4; Leyser, med. ad Pand. spec. 382; 1 H. Luis, de nat. leg. gen. et in spec. quo temp. deb. fruct. et usur. Goett. 1786.

inheritance, a free man must have been reduced anew to slavery ; with regard to the three latter exceptions, Ulpian says,¹ *nam cum ad hæredem non transferatur, frustra est si ante (ante aditam hæreditatem) quis diem ejus cedere dixerit*, for a personal service cannot, from its nature, devolve upon heirs.

This, then, is the rule of *cessio diei* in cases of legacies unconditional and not fixed to a day : the payment or delivery of which can be required as soon as the heir has administered, except in the case of a legacy *sub modo*, in which case the legatee must first give the necessary security.

Payment of absolute legacies due on administration.

In conditional legacies, the vesting and transmission to heirs depends wholly on the previous fulfilment of the condition imposed.

Of conditional legacies.

Legacies for a period, follow the rule of pure legacies. In *legatis ex die, dies cedit ut in legatis puris, venit autem tempore lapsi* ; if the legatee die before the day, the right devolves upon his heirs, who, however, can only demand delivery after three years without interest.

Legacies as affected by conditions of time.

If the time be utterly uncertain, the same rule applies as in conditional legacies.

The same rule applies also where it is doubtful if the condition will ever be fulfilled, as, A is my heir, having a life interest, on whose death B is legatee for 100 aurei ; hence this is *conditionatum*.²

§ 1180.

When the legatee has possession already, he must have acquired the right ; the *legatum* may then be of a *genus* or of a *species*. In the first case, the legatee is owner on delivery of an *individuum* appertaining to that *genus* : In the case of a *species*, if the object be bought by the heir, as soon as this latter makes the delivery the ownership commences ; but if it were in the testator's own possession, then the legatee is, *juris intellectu*, the *inchoate* owner on death of the testator, as far as transmission to heirs is concerned, but not for the purpose of demand, for if the heir refuse the inheritance (*si hæres deficit*) the legacy is utterly lost ; but if, on the contrary, the heir accept, the legatee acquires but a *resoluble* ownership, for he may refuse it : when, however, he has declared his acceptance thereof, he has the *irrevocable* ownership ; thus, Papinian says,³ *legatum ita dominium rei legatarii facit, ut hæreditas hæreditatis res singulas. Quod eo pertinet, ut, si pure res relicta sit et legatarius non repudiavit defuncti voluntatem, rectâ viâ dominium, quod hæreditatis fuit ad legatarium transit, nunquam factum hæredis.*

When the dominium of a legacy commences.

§ 1181.

The law of the Twelve Tables set no limit to legacies, *pater familias uti legasset, ita jus esto*, as has been before quoted, in consequence, however, of the ill effects produced by the unlimited

The law of the Twelve Tables did not limit legacies.

¹ P. 36, 2, 3.

² P. 35, 1, 1, § 1, 2, & 79, § 1.

³ P. 31, 1 (2) 80.

Which was first
done by the
Lex Furia.

nature of this privilege, many wills became destitute, the heir refusing to accept administration on account of the estate being exhausted by legacies; to remedy this evil, the *lex furia testamentaria* was introduced by the tribune Caius Furius, restricting legacies and gifts, *mortis causâ*, to 1,000 asses, an exception being made in favor of relations and certain other persons, as, for instance, the *cognati manumissorum*; ¹ the punishment on others for receiving a legacy contrary to law was a fine of four times the amount of such legacy, which must be admitted to be severe. Roman cunning, however, soon found a way to evade this imperfect law—more than 1,000 asses were never left in one legacy it is true, but legacies to that amount were so multiplied that the same end was attained as before; this gave rise to the

§ 1182.

Which was
amended by the
Lex Voconia.

Lex Voconia, introduced by Q. Voconius Saxa, A. U. C. 594, which forbade any Roman citizen (*census*) from receiving a legacy to a greater amount than the sum left to the heir; legacies to women were also particularly restricted by this law, of which Montesquieu affirms the primary object to have been to prevent women from attaining too great wealth; hence we find women excluded only from succession to those whose property was included in the *census*.

Exceptions
therefrom by
the Pappian law.

The Pappian law, enacted on a dearth of citizens to encourage marriage, appears to have taken certain cases out of the Voconian law, allowing women to succede to their husbands by will, especially if they had children, or even to strangers; the husband, according to the Pappian law, could succede to a stranger by will if he had one child, but a woman must have three children; nay, the mother was by the old law incapacitated from succeding to her children, which the Voconian law confirmed, but Claudius allowed it as a consolation for their loss; and Hadrianus to those who had, if ingenuous, three children, or four if manumitted, which may be considered as an extension of the *lex Pappia*, which was again an extension of the Voconian law; and lastly, Justinian conferred this right upon women independently of the number of their children.

Regulations of
Claudius
Hadrian,

and Justinian.

The Voconian law was, however, found also insufficient to effect the purpose it intended; for those citizens who had been accidentally omitted in the *census* claimed exemption from its operation on this plea.² Others left many small legacies, none of which were greater than the heir's share, and thus evaded the law.

§ 1183.

The Lex
Falcidia.

P. Falcidius, tribune under the triumvirate of Lepidus Octavianus, and Antonius, A. U. C. 714, brought in a *plebiscitum*,

¹ Ulp. Frag. 28, 7.

² Bach, *dis. de his quæ imputantur in quartam Falcidiam*, § 2, opusc. p. 435.

under the consulship of Cn. Domitius, M. F. Calvinus, and C. Asinius Pollio, which was more effective; according to this none could leave in legacy more than three-fourths, reserving one-fourth for the heir, who was empowered to reduce the legacies *pro ratâ*, should less than one-fourth have been left to him.

The words of this famous law are as follows:—

1. *Qui cives romani sunt, qui eorum post hanc legem rogatam testamentum facere volet, ut eam pecuniam easque res quibusque dare legare volet, jus potestasque esto, ut hac lege sequente licebit.*

2. *Quicumque civis romanus post hanc legem rogatam testamentum faciet, is quantam cuique civi romano pecuniam jure publico dare legare volet, jus potestasque esto dum ita detur legatum, ne minus, quam partem quartam hæreditatis ex eo testamento hæredes capiant. Eis, quibus quid ita datum legatumve erit, eam pecuniam sine fraude sua capere liceto, isque hæres, qui eam pecuniam dare jus sus damnatus erit, eam pecuniam debeto dare, quam damnatus est.¹*

According, then, to the provisions of² the Falcidian law, every testamentary heir,³ and by a later provision also every intestate heir⁴ has a claim to his share, called the *Quarta Falcidia*, free; a provision subsequently again modified. In examining this subject, five general questions present themselves, and first,

Who can deduct the Falcidian portion?

From whom?

In what exceptional cases it cannot be deducted?

How it is to be calculated? and

How deducted?

Who entitled to.

§ 1184.

The Falcidian rule is, that only *direct* heirs should have their share free and unencumbered, consequently they alone have this privilege of deduction;⁵ and what applies to heirs applies to all such as succede in their place.⁶ Legatees and fidei commissaries are generally not so empowered,⁷ except,—

1. When they have themselves suffered such deduction, in which case they may make a proportionate deduction⁸ from those to whom they pay legacies, save it be in the category of those exceptional cases where the heir himself is precluded from deducting,⁹ and where the legatee is not compelled to pay annuities,¹⁰ *annua legata*.

Who can deduct the *pars Falcidia*. Direct heirs, legatees, but not generally trustees. Single deduction.

¹ P. 35, 2, 1, Paulus lib. sing. ad Leg. Falc. The consciousness of this law might well form a precedent for modern lay *legislatores inducti*.

² F. Husmann, *parad. ad L. Fal.* (Otto Thea. T. 4) A. O. Olono, *paralip. jur. civ. l. 4, c. 1, seq.*; Voorda, *com. ad L. Fal.*; Westphal. von Vermäch, 2 B. § 1132-37.

³ P. 35, 2, 1.

⁴ P. 35, 2, 18.

⁵ P. 35, 2, 77; Voorda, 1, c. 5; v. Bern-

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stoff de rat. l. Fal. in sing. hæred. maxime substitut. ponenda, Goett. 1754; L. F. Harl. 1731-8; Westphal. l. c. 2 B. § 1132-47.

⁶ P. 36, 1, 63, § 11 & 71; C. 6, 50, 3; P. 36, 1, 55, § 2, & 63, § 11.

⁷ P. 35, 2, 47, § 1.

⁸ P. 35, 2, 32, § 4.

⁹ P. 35, 1, 43, § 1; P. 35, 2, 32, § 5.

¹⁰ P. 35, 2, 25, § 1.

Where many deductions can be made.

2. If the heir make them the grace of not deducting anything, such part comes to the legatees as a gift.¹

Now, many portions may fall to an heir, or his portion be subdivided among many parties, in which case,

1. If any one have received many portions as *institutus directus*,² or as *institutus* and *vulgariter substitutus*,³ or as *pupilariter substitutus* of many children, such various portions are reckoned as one.⁴

2. If the heir be the heir of a co-heir, his own portion is to be distinguished from the inherited portion.⁵

3. If many substitutes or remainder men succed in the place of one, every substitute can require to have his portion free.⁶

4. If a portion fall to an heir by right of cretion, both portions are separated if the cretive part be greater; but combined, if less.⁷

5. These distinctions hold if a father and son be named heirs, and the latter succede into the place of the former.⁸

6. Also, if any one inherit as instituted and substituted heir, *institutus* and *pupilariter substitutus*; for then he is not required to supply the *deficit*⁹ of the pupillary portion with the excess of his own portion,¹⁰ but must include the excess thereof into his own surcharged portion.¹¹ Now, if an instituted heir be substituted for a disinherited child, the two are separated,¹² though one, who is at the same time instituted and pupillary substituted heir, must combine his own portion with that he receives as *substitutus* in case the legacies be imposed upon him in that capacity.¹³

§ 1185.

From what the *pars Falcidia* cannot be deducted.

The *pars Falcidia* can be deducted from all kinds of separable or inseparable things¹⁴ left as legacies, bequests in trust of separate things, or of the whole property,¹⁵ left as a *donatio mortis causa*.

The following cases, however, form exceptions:—

1. Legacies left in a military testament,¹⁶ or
2. To charitable institutions,¹⁷ and forsooth unconditionally.¹⁸
3. In case of a *legatum debiti*, the deduction cannot be carried

¹ P. 36, 1, 1, § 19, arg.

² P. 35, 2, 11, § 5 & 87, § 3.

³ P. 35, 2, 1, § 13 & 87, 4.

⁴ P. 32, 2, 14, § 2.

⁵ P. 35, 2, 1, § 15.

⁶ P. 35, 2, 80, pr.

⁷ P. 35, 2, 78 & 87, § 14; Kapff, de detract. Fal. part. grav. vel non grav. coheredi accresc. Tab. 1786.

⁸ P. 35, 2, 25, pr.

⁹ P. 35, 2, 11, § 7 & 87, § 4.

¹⁰ P. 35, 2, 25. ¹¹ P. 35, 2, 87, § 5, 8.

¹² P. 35, 2, 10.

¹³ P. 35, 2, 1, § 12; ibid. 11, § 5; ibid. 31; ibid. 79; ibid. 80.

¹⁴ P. 35, 2, 1, § 6, 7, 10; ibid. 19; ibid. 30, § 1.

¹⁵ P. 35, 2, 1, pr. § 13; ibid. 18; C. 6, 50, 5, 12; C. 8, 57, 2; Lauterbach, coll. L. 35, T. 2, § 9; Madihn Miscell. 1, p. 142; C. 5, 16, 25, does not apply.

¹⁶ P. 35, 2, 17, 92 & 96; C. 6, 50, 7; Kapff, de L. Fal. in mil. test. ex prohib. cessante, Tub. 1787.

¹⁷ C. 1, 3, 49; Nov. 131, 12.

¹⁸ Conradi, pr. de qt. fal. leg. in dona peor. relict. deduc. Helmst. 1747; Voet. 35, T. 2, § 16; Bardili, ad pias causas, § 31; contra, Westenberg, princ. D. 15, 2, § 29.

so far as to trench upon the sum really due, nevertheless, on account of the privilege of prepayment in such cases, the heir may calculate *interusurium*, deducting the Falcidia therefrom;¹ but it does not hence follow that the creditor must submit to any diminution, because the testator has represented the debt as greater than the truth.²

4. The testator can indirectly forbid³ the deduction by a proviso against sale of the object.⁴

5. No deduction can, as a matter of course, be made in the *legatum libertatis*.⁵ The slave freed cannot be charged with a fourth of his value.

6. Nor where the legacies are to be reckoned into the legal share,⁶ or

7. Be without worth to the payer.⁷

8. When the heir has endeavoured to suppress a legacy, or promised secretly (*tacite*) to give it to an incapacitated person in an illegal manner, the legacy or *pars Falcidia* is forfeited to the treasury.⁸

9. In cases where the heir has studiously avoided making an inventory.⁹

10. In cases where the heir has forgone his right;¹⁰ such is the case when the heir has omitted in a legacy, or indeed in any legacy, wittingly or from an error as to the law, to make the legal deduction.¹¹

11. The legatees can dispute the deductions of the purchaser of the inheritance (*emptor familiæ*), in cases in which he promised the seller to pay all legacies in full¹² (this resolves itself rather into a case of contract).

12. Lastly, no deduction can be made from legacies given by the heir for the fulfilment of a condition, and which, in truth and in fact, are not legacies at all, but are in the similitude of a consideration.¹³

§ 1186.

The calculation of the Falcidian portion is estimated by certain fixed rules, and may be divided into four categories, as follow:—

First, all debts on the inheritance are to be deducted;¹⁴

Falcidian part,
how calculated.
Available assets,
how ascertained.

¹ P. 35, 2, 1, § 10; P. 33, 4, 1, § 12; Buchholz, jurist Abhandlung, nr. 8; P. 15, 1, 9.

² Hofacker, T. 2, § 1512; Höpfner, Com. (Weber) § 599, n. 1.

³ Nov. 1, c. 2, § 2.

⁴ N. 119, c. 11; Voet. 35, 2, § 2.

⁵ P. 35, 2, 33, 34.

⁶ P. 31, 1 (2), 87, § 3.

⁷ C. 6, 50, 15.

⁸ P. 35, 2, 13; ibid. 24, pr. 68, § 1.

⁹ C. 6, 30, 22, § 15, thinks a fraudu-

lent cause necessary; Wernher, lect. com. 35, T. 2, § 14.

¹⁰ P. 35, 2, 46, 71; C. 6, 50, 18.

¹¹ C. 6, 50, 9; N. 1, 3; P. 35, 2, 15, § 2; ibid. 16.

¹² P. 35, 2, 71.

¹³ P. 35, 2, 1, § 8; ibid. 44; C. 6, 50, 18, makes this doubtful; sed vide N. 1, 2, § 2, which appears to clear it up.

¹⁴ P. 35, 2, 66, § 1; ibid. 69; C. 6, 50, 6, 14; Estor Proc. 3 B. § 132, seq. as to the mode of estimation; Thibaut, l. c. § 918.

Secondly, Those legacies which, by their similarity to debts, suffer no deduction ;¹

Thirdly, The legal share of such necessary heirs who are burdened with a legacy ;²

Fourthly, All burial charges ;³

Fifthly, All expenses attendant upon regulating the gross estate ;⁴ and,

Sixthly, The value of all slaves⁵ manumitted by will.

When the available value of the estate has been thus settled,

The second category contains seven positions.

What included
in the Falcidian
fourth.

The heir can require that a clear fourth part be reserved for him, clear as his hereditary portion, after including,—

1. All pre-legacies payable by himself to himself ;
2. All legacies payable to him ;
3. All things given to him as part of the inheritance in the lifetime of the testator ;⁶
4. All reciprocal legacies of co-heirs⁷ are reckoned thereto as *surrogata* ;

5. Everything which may be directed to be paid by the legatee, though not in the form of a conditional legacy, so as to be looked upon as the price of a purchase to be made by him ;⁸

6. He does not reckon on what comes to him by a singular title,⁹ nor

7. The value which a rash speculator may have paid him for an insolvent inheritance.¹⁰

Estimation of
profit and loss
on the three-
fourths.

The third category contains the estimation of profit and loss.

The available value of the property is to be calculated at its actual market value at the time of the testator's death,—what may accrue afterwards the heir is not obliged to bring into account ; on the other hand, he must bear the depreciation of the inheritance,¹¹ when such loss does not arise on the species or genus left in legacy.¹²

The heir, however, must include in the computation of the three-fourths all emblements ripe at the testator's death, though husband and gathered in afterwards ;¹³ and all emblements due on all legacies conditional or deferred without the proper fault of the legatee,¹⁴ (*sub conditione* and *ex die*), which have gathered.

The fourth,
how deducted.

The fourth category contains the mode of deduction.

¹ Wernher, vol. 5, obs. 92 ; Voet. 35, T. 2, § 26.

² Faber, err. prag. D. 11, E. 6 ; Thib. l. c. § 929.

³ P. 35, 2, 1, § 19.

⁴ P. 35, 2, 72 ; C. 6, 30, 22, § 9.

⁵ P. 35, 2, 36, § 2.

⁶ P. 35, 2, 11, pr. ; ibid. 50 ; ibid. 51 ; ibid. 52, § 1 ; ibid. 56, § 5 ; ibid. 74 ; ibid. 76, § 1 ; Cuj. ad Paul. R. S. 8, 3, § 3 ; Westphal. Vermäch. l. c. § 1271 & 1341.

⁷ P. 35, 2, 22, pr. ; ibid. 94.

⁸ P. 35, 2, 19 ; ibid. 30, § 7 ; ibid. 76, pr. ; P. 35, 1, 109.

⁹ P. 35, 2, 15, § 7 ; ibid. 29 ; ibid. 74.

¹⁰ P. 35, 2, 3, pr.

¹¹ P. 2, 22, § 2 ; P. 35, 2, 30, pr. ; ibid. 73, pr.

¹² P. 35, 2, 30, § 3, 4 ; Voet. 8, 28, § 22, goes still farther.

¹³ P. 35, 2, 9 ; ibid. 88, § 3.

¹⁴ P. 35, 2, 1, § 12 ; ibid. 16 ; ibid. 15, § 6 ; ibid. 24, § 1, pr. ; ibid. 45, pr. § 1 ; ibid. 77, § 2 & 4.

1. The Falcidian deduction is made *pro rata* from the legatees.
2. What is given to one must not be burthened on the rest.¹
3. If the thing left be indivisible, the legatee must indemnify the heir in money in respect of his share, according to a valuation.²
4. A usufruct may be divided and retained, or
5. One of several things be kept back in satisfaction of the Falcidian fourth.³
6. If they be many, the law furnishes many different ways of calculating the value of a legacy so dependent on future contingencies.⁴

§ 1187.

Now the Falcidian fourth is deducted by the heir when charged with inordinate legacies; and although by the Falcidian law the testamentary heir alone has this privilege, yet it was afterwards allowed to the intestate heir so administering codicils in like case. Now every co-heir must have the fourth clear, which he would get if no legacies were imposed upon him. Let A B C be co-heirs.

Exemplifications
of the above.

In the case of
co-heirs.

The heir must first pay all charges; now, let it be supposed that

Prepayment of
charges on the
estate.

	Aurei.
The estate to amount to	20,400
The debts to	7,500
Funeral expenses to	300
Sealing the inventory to	600
	8,400

Available assets 12,000

Upon which he may take his Falcidian fourth. To calculate this, that only must be taken into account which he gets as heir, not that which he gets under another title as legacy, &c. Now A and B are heirs,—to A 2,000 are prelegated: the estate amounts to 10,000.

	Aurei.
A gets a prelegacy of	2,000
Then, as heir, he receives	4,000
	6,000
Total	6,000
Three-fourths amount to	4,500
He pays legacies of	4,000

Here he gets more than a fourth, and can therefore make no deduction from the legatees. But the laws determine that the prelegacy shall not be all taken into account, but only a part

¹ Nov. 1, 3.

² P. 35, 2, 7 & 80, § 1.

³ P. 35, 2, 1, § 9; *ibid.* 23; *ibid.* 81, pr.

⁴ P. 35, 2, 1, § 16; *ibid.* 3, § 2; *ibid.* 47, pr.; *ibid.* 55; *ibid.* 68, pr.; Westphal.

v. Verm. 2, § 1310; Gesterding Nachf. 1 B. 364-69; Schmelzer, *com. de prob. vel. ejusq. usu foren.* Goett. 1780, 8; Thib. l. c. § 918, in fin.

And he can deduct nothing from the legatee ; but, in the mean time, a house belonging to the estate, worth 2,000 aurei, is burned down.

	Aurei.
The estate is now	10,000
The legacies	9,000
The heir does not get his fourth clear, but only	1,000

§ 1188.

The French law, as consolidated under Napoleon,¹ limits the *pars quota* of the estate desponible by testators to half, if the testator leave one legitimate child, to a third if he leave two, and to a fourth if he leave more than that number—the term *enfants* including all descendents without reference to degree, immediate children inheriting *in capita*, and their representatives *in stirpes*.

The legal portion of the French law.

With respect to ascendents the desponible portion is limited to half the estate where ascendents are left in one line only ; and to three-fourths if in both lines.

Collaterals have no legal claim except in cases of intestacy.

This is a modification of the Falcidian principle.

§ 1189.

The Moohummedan law contains a provision resembling those of the *pars Falcidia* of the Roman law.² It protects the interests of heirs against the gratuitous acts of the testator on his deathbed, as well as against his bequests beyond a third of the clear residue of his estate after payment of debts ; consequently, gifts made under these circumstances must not exceed the third, unless confirmed by the heirs *after*, not *before*, the donor or testator's death.³ Neither are gifts in a last sickness, nor legacies, valid to any extent unless so confirmed, where the person in whose favor they are made is also an heir. In like manner, the law is so jealous of the partiality of the deceased for any particular heir, that acknowledgments of debt made on the deathbed in favor of an heir are utterly void, unless afterwards assented to by the other heirs. As the law has placed no control over a husband's power of divorce, he might, by exercising it in his last moments, deprive a wife who had incurred his displeasure of her right of inheritance, but that is obviated by a provision,—that a divorced wife shall retain her right of inheritance, unless her husband survives the completion of her *iddut*, or the period during which it is unlawful for her to enter into another marriage.⁴ There is

The legal portion of the Moohummedan law.

¹ Code, liv. 3, Tit. 2, ch. 3, § 1 & seq.

² Sirajiyah et Shureefeca, App. Baillie's Moohummedan Law of Inheritance, Calcutta, 1832, p. 3.

³ Hidayah in eodem. Because the right has not accrued, and the assent may be

annulled upon the death of the testator—Hamilton's Hidayah, vol. iv. p. 470.

⁴ This is three months, if not pregnant ; if pregnant, it is accomplished on her delivery, Id. vol. i. p. 359-60.

one way, however, in which a husband can, even upon deathbed, materially reduce the share of the inheritance to which his wife would be entitled,—that is, by marrying or acknowledging a marriage with another woman, by which means the widow's share would be divided among both equally. The wife newly married, or acknowledged, would also be entitled to a reasonable dower; but that, as a debt, would fall on the general estate.¹

§ 1190.

How the heir
can satisfy his
Falcidian share.

The heir has various modes of satisfying his Falcidian share.

1. If in possession of the legacy, by actual deduction² or caution.³

2. If, on the contrary, it be in the possession of the legatee by illegal usurpation, the heir attacks him by appropriate interdicts;⁴ but if the heir by an error in fact have given up too great a part of the legacy, he can reclaim the excess *condictione indebiti*⁵ by an action in debt. On the other hand, if the legatee have got too much by other means, still, without force, the heir's remedy will be by *actio in factum*, or action on the case *ad exhibendum*, a sort of *distinguas* to compel production, or *rei vindicatio*,⁶ action of detinue, or bill for specific recovery.

§ 1191.

Legacies held
before institution
of heir formerly
ineffectual.
Allowed by
Justinian.

Justinian⁷ tells us that any legacy left before the institution of the heir was by the old law ineffectual, because that was the very soul of the testament; hence a slave could not be manumitted by will, if an heir had not previously been instituted. But the emperor, conceiving it unjust to allow a mere formality to supersede the will of the testator, permitted a legacy to be left before the institution, or in the period between two institutions, more especially when it was a question of liberty.

§ 1192.

The loss of
legacies.

Ademptio.

Translatio.

The title of the Institutes⁸ de Ademptione Legatorum treats of invalid legacies, and these may be so, Ademptio vel Translatione.

Ademptio, in its generate sense, is the revocation of a legacy,⁹ but in its particular sense it means the revocation of a legacy without the substitution of another in its place; whereas *translatio* is the altering a legacy already given, or the exchange of it for another.

This former may be by words, deeds, or implied by law. Heineccius, indeed, divides them somewhat differently, *ipso jure* and *ope exceptionis*.

¹ Hamilton's Hiday, No. 12, Trans. vol. iii. p. 162.

² P. 35, 2, 15, § 1; *ibid.* 93; Kahle, de rem. jur. hæred. ad conseq. quart. Falc. comp. Goett. 1803.

³ Thib. l. c. § 940.

⁴ Thib. l. c. § 895.

⁵ C. 6, 50, 9.

⁶ P. 10, 4, 5, § 1; P. 31, 1 (2), 77, § 2; P. 35, 2, 26, pr.

⁷ I. 2, 20, 34.

⁸ I. 2, 21.

⁹ T. F. C. Raydt, *commen. de variis, quibus legat. inval. fieri possunt modis quorumq. div. effect.* Ludg. 1794-4.

§ 1193.

Ademptio is said to be by words when the testator declares in his will¹ or codicil, executed before five witnesses,² whether confirmed or not in the will, a former legacy to be void. Justinian says *eodem testamento*,—that is, what was done at the beginning can be undone at the end, for a new will would revoke the former one, legacies and all; even so a later clause a former one. It is contended how far a legator can revoke a legacy, before one, two, three, or four witnesses, or in writing without any witnesses.³

Ademptio, how effected.

By deed a legacy may be recalled, as by the testator cancelling his will, by his destroying the thing left, or changing its form so that it cannot again be reduced to its former shape, but if it can the legacy stands good.⁴ When the testator without necessity sells the thing he has left, or gives it away;⁵ and lastly, when he collects the outstanding debts without absolute necessity, the legacy is *adempted*.

When presumable.

Ademption is presumed by law when a deadly enmity has arisen between the testator and legatee before the former's death, and no reconciliation taken place;⁶ but a slight difference of opinion is not sufficient to invalidate the legacy.

It has been a question why this cause should invalidate a legacy, and not the institution of an heir? a much more important matter. The answer is plain,—that, in case of an heir, the circumstance of the entire inheritance being entrusted to a party could not escape the memory of the testator, but an incident to such will might.

§ 1194.

When a legacy is doubtfully given or taken from two persons, it is often difficult to decide to whom the legacy belongs. On this subject the following two passages, to be found in Ulpian's fragments, have been fertile causes of debate:—

Controversial passages in Ulpian.

Si duabus filiis separatim legaverit nec uni ademerit, nec adpareat, cui ademptum sit, neutri (Flor. utrique) *legatum debetur quemadmodum et in dando, si non adpareat cui datum sit dicemus neutri legatum.*⁷ The other passage is,—*Sed et si duobus hominibus ejusdem nominis fuerit legatum, puta Sempronii. mox Sempronio ademptum sit, nec adpareat cui ademptum sit? utrum datio in utriusque personâ infringitur, an ademptio nulla est, quæri potest; item si ex pluribus servis ejusdem nominis uni vel quibusdam libertas*

¹ I. 2, 21. ² Vinn. ad I. 2, 21, pr.

³ C. 6, 42, 27; pro Harpprecht, ad § 1, I. 2, 21; Stryk. cant. test. 23, 30; Cocceii, jur. con. 2, 21, qu. 1; Wernher, P. obs. 300; Crell. diss. ad D. 34, 4, 3, 11; Puffendorf, tom. 2, obs. 116; contra, Lauterbach, coll. I. 2, 21, § 5; Berger, O. I. p. 305.

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⁴ Vinn. ad I. 2, 20, 19.

⁵ Vinn. ad I. 2, 21, 12 & 3.

⁶ Puffendorf, tom. 1, obs. 39; P. 34, 4, 3, 7; P. 34, 5, 10, pr.; Chesius, in diff. jur. civ. in jurispr. rom. 2, 15; Goeschen, 634, 5, 10.

⁷ P. 34, 4, 3, § 7.

*relicta est? et verius est in his omnibus etiam legata et libertates impediri ademptionem autem in utrumque valere.*¹ If with Pothier we adhere to *neutri*, all difficulty is removed.

§ 1195.

Translatio.

Translatio changes :—

The person of the legatee,—

The person of the co-heir who is to pay the legacy,—

The thing left, or,—

The mode of leaving it, as by making an unconditional legacy conditional, or vice versa.

In transferring a legacy from one person to another, it is not sufficient to say who shall now have it, it must also be said that the former shall now *not* have it, for otherwise the two would become co-legatees. This change must be performed in the second as in the first instance, either in the will, codicil, or by verbal order to the heir; for if this be not observed, the declaration will be looked upon as an ademption, not as a translation, for if not done in due form *recte ademptum est legatum sed non recte translatum*.

§ 1196.

Legati extinctio.

Extinctum is said of a legacy when it was good at the beginning, but becomes invalidated afterwards: thus,

A legatee may die before the testator without having a co-legatee joined with him, who would take it *jure accrescendi*, and save its extinguishment;

He may not outlive the fulfilment of the condition;

The testator may leave the legatee a thing not belonging to him, which this latter subsequently acquired *gratis* before the testator's death;

The thing left may be destroyed without the heir's fault; or, lastly,

The condition of the legacy may not come to pass.

§ 1197.

Legata nulla.

Nulla are legacies from a fault in the will, as when it is *nullum ruptum irritum destitutum*, or when the codicil containing them is invalid. But legacies are not affected by wills declared null in the 115 Novella, or generally upset as inofficious *si recissa sunt*.

§ 1198.

Legata pro non scripta habita.

Pro non scriptis habita legata are such as are invalid from the beginning, although contained in a valid instrument: thus,

When a legatee writes the will, even *dictante vel imperante*

¹ P. 34, 5, 10.

testatore, who does not with his own hand note such to have been the case,¹ the legacy is void ;

When the testator leaves a legacy to one incapable of taking it ;

When the legatee was dead at the time it was given ; or,

When so darkly expressed as to be incomprehensible.

§ 1199.

Legata ereptitia are such of which the legatee is deprived on account of unworthy conduct, as, Legato ereptitia.

When the legatee has by will or neglect caused the testator's death ;

If the legatee impeach the will without ground as false, institutes the *querela inofficiosi*, or demands *bonorum possessionem* as regards the will ;

When he has robbed the inheritance ;

When he or she has committed adultery with the testator or testatrix ;

Slandered the testator after his death ; or,

Hidden the testament.

In the four first instances the legacy lapses to the exchequer ; in the two latter, to the heir.

§ 1200.

We have seen how a *fidei commissum* differs from the *heredis institutio directa*, and from a legacy ; let us now observe that a *fidei commissum* is either *universale* or *particulare*, otherwise *singulare*,² which latter belong in this place. Fidei commissum, or bequests in trust are singular or universal.

Bequests in trust arose in the circumstance of there being many persons who, by the Roman law, were incapable of being named heirs or legatees, but to whom the testator wished to leave something : such were women incapacitated by the Voconian law, still the testator might wish to bequeath property to his widow or female relations ; others had not the *testamenti factio*, and in regard of such persons, the only means were to request the heir-at-law to make over a certain sum to them. Again, respect due to the heir sometimes forbade the testator from imposing a command on him ; lastly, it has been seen that an heir could not be instituted for a fixed period, as for instance, for life, wherefore the heir was requested to cede the heritage after a certain period to a person designated ; hence such bequests were called *fidei commissum*, because entrusted to the honor of the heir, who might or might not comply with the wish of the testator ; but under Augustus,³ *fidei commissum* obtained Their origin.

P. 34, 8, 1 ; P. 48, 16, 6 ; *ibid.* 14, § 1 ; *ibid.* 18 ; *ibid.* 22, § 6 ; *ibid.* 29 ; *ibid.* 40, 10, 15, pr. ; C. 9, 23, 1 ; *ibid.* 3 & l. pen. ; *ibid.* 48, 10, 1, § 8 ; *Ib.* Jac. Mascov. *Diss. de his qui sibi adscr. in test. ad capt. actm. Neronianum* ; J. W. Marckart,

diss. de his, &c. n. 3 ; Stryk. *de cant. test.* n. 20 ; Westphal. v. *Feat.* § 812 ; Paul. *reapt. R. S.* 3, 6, 14.

² Vide Westphal. *Vermächst, und Fidei com.*

³ I. 2, 23, 1.

Why so termed.

Made under Augustus.

a binding power of fulfilment on the heir, with the restriction, however, that none who could not inherit could be the object of a *fidei commissum*, neither could any one receive such bequest who was not capable of making a will;¹ hence the *fidei commissa* lost their first and second objects, but retained the third and fourth, which were indeed the most important; henceforth, then, the *fidei commissa* were no longer framed precatively, but imperatively; but the terms of institution still materially differed from those of *fidei commissa*, the first being framed as before observed. But when the difference between both kinds of expressions was abolished, the only distinction which remained was, that the heir inherited immediately the *fidei committee* mediately through another. The Emperor Claudius invested the jurisdiction over *fidei commissa* in two prætors ad hoc, whom Titus reduced to one.

Prætorian authority in matters of F. C.

§ 1201.

F. C. universale differs from singulare.

Universale was when the testator ordained the whole inheritance to be delivered to the heir, *particulare* when a *pars quota* only; some distinguish between this and *singulare*, by which they understand a certain specific thing only, calling it otherwise *speciale*; but it is considered more in accordance with the Roman idiom that universale should apply to the whole or a *pars quota*, and *particulare* or *singulare* to specific things.

Requirements of a F. C.

A universal *fidei commissum* is a disposition by which the heir is bound to cede the whole or a *pars quota* of the inheritance to another, and has three requirements,—an heir to be commanded,—that he be commanded, and that he be so commanded that the *fidei committee* succede as heir *titulee universali*; the term *successor universalis* then applies to such person, that of *successor singularis* to the particular heir, who is in this case indeed no heir at all.

Difference between a trustee and an heir.

The rights of a direct heir and trustee, or *fidei committee*, differ widely, for the first can seize the *possessio vacua* if not opposed, while the *fidei committee* must wait till the direct heir takes possession and delivers him up the inheritance; the former has an active, the latter a merely passive power: a direct heir can only be named in the testament a *fidei committee* in three ways,—by testament, codicil, or viva voce, even without witnesses;² the direct heir obtains the inheritance on entry only, but a *fidei committee* transmits the inheritance to his heirs though he die without declaration that he will be heir at trust, *fidei commissum licet non agnitum ad hæredes transmittitur*.³ The *fidei committee* obtains, indeed, no real right on the inheritance, but still a right of personal action to compel the fiduciary heir to deliver up the inheritance.⁴

¹ Heinec. ad L. Jul. et Papp. Popp. l. 2, c. 6, § 1, l. 3, c. 9, § 7.

² C. 6, 42, 32; I. 2, 23, 12.

³ P. 36, 1, 35; P. 36, 1, 46; C. 6, 42, 3; C. 51, 1, 7.

⁴ P. 5, 6, 1; P. 36, 1, 63.

The testator is termed *fidei committens*, the fiduciary heir *hæres fiduciarius*, and the recipient *hæres fidei commissarius*; moreover, the *hæres fiduciarius* still remains heir after he has delivered up the inheritance, for once heir ever heir; *hæres fiduciarius manet hæres etiam facta restitutione*; in consequence, then, of the fiduciary heir being liable for debts, and deriving no personal benefit from the trust, many wills became *destituta*.

The different parties to a trust estate.

§ 1202.

Fidei commissa may be either express or implied; *expressa* by distinct words addressed to the fiduciary heir *ut restituat hæreditatem*, or by an order implying the restitution, as "A is my heir, but I will he make no testament till he shall have issue;" or, "A is my heir, but I will that he name B his heir," which implies that A has only a life interest.

A F. C. may be express or implied.

Justinian limited *fidei commissa* to four degrees by the 115 Nov. (1) A shall be my heir and restore the inheritance to B, (2) B to C, (3) C to D, (4) D to E, and here it stopped.

F. C. limited by Justinian.

In Germany this is not observed, for *fidei commissa* there, are a means of entailing property, and lasts as long as any member of the family can be found.¹

In Germany they are unlimited.

A direct heir may also be an heir in trust; ² this is not so by the old Roman law, the *fidei commissarius* being one who could not inherit directly.

Not only testamentary heirs, but also heirs at law can be required to restore the inheritance,³ because the testator might have superseded the heirs at law altogether; the legal portion, however, forms an exception, it must be left *sine ullo gravamine*.⁴

F. C. may be imposed on heirs at law.

§ 1203.

A *fidei commissum* may be made unconditionally, as A is my heir, but he shall immediately deliver half the inheritance to B; or, conditionally, as A is my heir, but if he leave no legal issue it shall revert to B; or, from a certain time, as A is my heir for the term of his natural life, after which it shall pass to B; this, we know, could not be done in the case of *institutio directa*.

How a F. C. can be erected.

§ 1204.

In consequence of the fiduciary heir being liable for debts, and deriving no advantage from the trust, the *Senatus Consultum Trebellianum* was promulgated under Nero, transferring the action of the creditors to the *hæres fidei commissarius*; notwithstanding, the

The Senatus Consultum Trebellianum transfers actions.

¹ Rittershus, ad Nov. 159; Fachinei, lib. 4, c. 10; Struv. ex. 36, th. 20; Knipscheld, de fid. com. fem. c. 9, n. 404, seq.

² Ulp. 25, 25.

³ P. 36, 1, 6, 1; C. 6, 49, 5.

⁴ This question will be fully investigated under *fidei commissa universalis* post quod vide.

fiduciary heir still continued so, and if he retained a part of the inheritance, delivering up the remainder, the *actio hæreditaria* was split, *pro rata*, between both parties; in fact, the right of recovery was made to attach to the property, not the person.

§ 1205.

The *Senatus
Consultum
Pegasianum*.

Although the fiduciary heir was thus protected from all risk, yet he still had no advantage from his heirship in cases where he had to restore the entire inheritance; hence the second *Sctum.* on this subject, called *Pegasianum*, passed under Vespasian, enacting that a fiduciary heir should never be obliged to restore more than three-fourths of the inheritance, and empowering him to retain one-fourth despite the provision of the will; but, on the other hand, should he, notwithstanding these advantages, refuse to accept the inheritance, he was compellable thereto, and furthermore punishable by the loss of his fourth, and obliged to hand over the entire inheritance to the *fidei commissarius*; this fourth was the *pars Falcidia*, for in fact the *Sctum. Pegasianum* did no more than extend the Falcidian law to *fidei commissa*.

Extends the *lex
Falcidia* to *F. C.*

The debts were paid *pro rata*; hence the fiduciary heir entered into a contract, *stipulatio partis et pro parte*, with the *fidei commissarius* to pay an aliquot part of the debts, and this was required to prevent the *actiones hæreditariæ*, which had not been again alluded to in the *Sctum. Pegasianum*, from passing, for otherwise the *fidei commissary* heir, whom the creditors could always sue, would have no power of forcing contribution from the fiduciary heir for his portion.¹

Justinian confirms these *Scta.* with modifications.

Justinian confirmed the above two *Scta.*, with certain modifications.

That every heir commissioned to administer to a part or the entire inheritance, should be empowered to keep back his fourth.

That if he administered willingly, and restored the whole estate, all actions by heirs should pass to the *fidei commissary* heir.

That when he was only required to resign a portion, or retained his legal fourth part, the *actiones hæreditariæ* should pass *pro rata*; hence the *stipulationes partis et pro parte* become unnecessary.

That the fiduciary heir was compellable to administer, losing his fourth, but all *actiones hæreditariæ* pass to the *fidei commissary* heir.

Lastly, that all these provisions were to be considered as if inserted in the *Sctum. Trebellianum*.

§ 1206.

Restitution of
excess delivered

With reference to the restoration, if a fiduciary heir deliver three-fourths, believing erroneously that his own one-fourth will

¹ Vinn. ad I. 2, 23, § 5 & 7.

be free, but finds it falls short, he may require restitution of the deficiency ; but legacies and donations in contemplation of death,¹ in short, everything the heir had received from the testator, including mean profits, was counted as a part of the *quarta Trebelliana*, as it was called in the case of *fidei commissa*, better to distinguish it from the *quarta Falcidia*, properly so called.

in error may be demanded by the hæres fiduc.

But the case now arises in which the estate passes through many trusts, as above alluded to. In this case the fiduciary heir A deducts his one-fourth, and delivers to B, B to C, however without further deduction, and so on through the four degrees : the reason of this is clear, the Trebellian fourth was introduced to prevent the testament being destitute, and this end once attained, it ceased with the necessity for it.

With respect to legacies, if the fiduciary heir has more than his fourth he pays the legacies ; if more, yet not enough to do so entirely, he pays them *pro rata* with the *fidei commissarius*, but when the fiduciary heir is to restore the estate to a certain sum or certain thing, he is to be considered as a legatee, and pays no legacies.

§ 1207.

The twenty-fourth title of the Institutes treats de *singulis rebus per fidei commissum relictis*. How the universal differs from the particular generally, we have already seen. Legacies were also by Justinian assimilated to *fidei commissa*.

Distinctions between legacies and trusts taken away by Justinian.

The only remaining distinction was with respect to a slave declared free by way of legacy, in which case the heir lost his *jus patronatus*, and the slave was termed *orcinus quia patronus in orco est* ;² but when the slave is freed by *fidei commissum*, the heir retains the *jus patronatus*. Many insist on another difference,³ viz., that a legacy can only be left in testaments and codicils, but *fidei commissa* be left *viva voce* and without witnesses ; but, inasmuch as Justinian has assimilated the two, this ground falls away, in addition to which the expression *ne depereat ultima voluntas testatoris fidei commissum*⁴ is general.

Exemption.

There are two other asserted differences, which, however, are not sustainable, and which, to avoid confusion, are omitted.⁵

§ 1208.

Ownership is the right of free disposal of an object, and includes the right of alienation *in re* or *ad rem* ; and, although it might be presumed that no one can transfer this right of ownership to whom it does not belong, yet there are cases in which the legal owner is estopped from alienating the object, but where he

Who could alienate.

Apparent paradox that the

¹ Cuj. ad Pap. resp. l. 2, p. m. 82 ; Val-
lius, ad L. 91 ; D. ad Leg. fal. in Theaus.
Off. tom. i. p. 437.

² Vinn. ad l. 2, 24, § 2.

³ Franzk, ad § fin de fid. com. ; Sande,

l. 4, c. 5, def. 18 ; Faber, de error pragmat.
dec. 67, error 7 ; Huber, prælect. ht. n. 3.

⁴ l. 2, 23, § 12.

⁵ Sed vide Höpfner ad Heinec. Inst. §
584 & 624.

legal owner
cannot alienate
when the pos-
sessor can.

Dos mulieris.

Fundus dotalis.

*Alienatio
pignoris.*

Pupils and
minors cannot
alienate.

Remedy when
they have
wrongfully
done so.
Where existent.
When con-
sumed.

When bona
fides exist.
*Conditio sine
causa.*
When mala
fides, *conditio
sine causa*, and
ad exhibendum.

who is not such legal owner may do so, and vice versa. The explanation of the above apparent paradox is the object of these following paragraphs.

The Lex Julia prohibited a husband to alienate his wife's portion, although given him *dotis causâ* without her consent. This Justinian modified to a certain extent, as may be seen in a former paragraph;¹ for instance, the *fundus dotalis* in Italy could not be alienated by the husband against the wife's consent, nor could those lying in the provinces be even mortgaged, lest the woman should be induced to do, by reason of her natural weakness, what was against her real interest.

A creditor could alienate a pledge, because the contract is that the creditor should make the security available in default of the payment of the sum advanced; but, in order to prevent abuse on either part in the distraint of pledges, particular constitutions regulated the formalities to be observed.

The owner cannot alienate if he be a pupil or minor, for, although the legal estate vests in such, they are to sue out administration; and it has already been seen that they cannot grant a loan, or effect a payment.²

The minor cannot grant a loan, because he thereby alienates part of his property; but if he have done so, and the object be still in existence, his tutor or curator may vindicate it; but if it be consumed, he must institute a personal action against the receiver for an object of like quantity and quality: for here various cases may arise,—the object may have been absolutely consumed, as when wine has been drunk, or its form so changed that it is not possible to restore it to its original condition, or so mixed as not to be severable,³ in which two last cases it is as much consumed in the eye of the law as in the first. When the consumption took place *bona fide*, that is, the borrower was ignorant of the incapacity of the lender, *conditio sine causa* but not *conditio ex mutuo* will lie; but where *mala fides* exists, *conditio sine causa* or *ad exhibendum* are the proper forms of action; the latter is, however, more advantageous to the actor or plaintiff than the former, because the *juramentum ad litem* being admissible, he can tax his damage on oath.⁴

§ 1209.

Women inca-
pacitated from
testation.

It is clear that women, in more ancient times at least, were incapacitated from testation for several reasons,—being incapable of participating in the *comitia*, they were consequently excluded from those solemnities by which wills were made; they were not, moreover, *sui juris*, or their own masters, but under a perpetual

¹ § 1095, h. op.

² Vid. § 750, p. 589, h. op.

³ P. 46, 3, 78; Vinn. ad I. 2, 8, § 2, n. 2.

⁴ P. 10, 4, 3, § 2.

disability, arising either from the actual paternal power, the paternal power in its fictitious form of coverture, or under that of curatela or wardship. At a later period, however, when women, not certainly for the general benefit of Roman morality, became emancipated; when the form of marriage implying the marital power was abandoned; when, in short, a married woman remained *non obstante*, her coverture, *defacto*, though not *dejure*, a feme sole, she was permitted to make her will with the consent of her tutor, *auctore tutore*; ¹ hence their testaments could not be made clandestinely, and these testatrices were exposed, it would appear, to considerable risk. ²

The old rule, however, continued to apply to such women as were *in manu*, *capite deminutæ*, or in the place of *filix familias*.

¹ Ulp. Fr. 20, 15; Cic. pro Cæc. 6.

² P. 31, 1, 77, § 24; Merrill, obs. 2, 1, p. 69 & 4, 39, p. 55. It is an error to presume that women could only make nuncupative wills, for see Val. Max. 7, 8, 2; Suet. Galb. 5; Plin. Ep. 2, 20, and where they wrote the heir's name. P. 5, 2, 19;

P. 33, 37, § 6; P. 38, 6, 33; C. 3, 28, 3; Heinec. com. in L. P. Jul. et P. P. 2, 11, p. 240, seq.; Aur. Galvan. de usufr. 9, ult. et V. C. Schult. ad Ulp. p. 602; contra, Cuj. obs. 7, 11, ad Ulp. et Alexander ad Gaius, Inst. 2, 2, 1.

TITLE XI.

Modi acquirendi Universales—Definitio Successionis et Hæreditatis—Successio per Testamentum—Origin of Testaments—Genera Testamentorum—In Pace—In Procinctu—Per Æs et Libram—Chirographa et Holographa—Prætoria—Solennia—Nuncupativa—Insolennia—Privilegiata—Militaria—Principi vel Judici Oblata—Parentum inter Liberos—Rusticorum—Tempore Morbi Facta—In Favorem Hæredum Intestatorum—In Pios usus—Quibus competit Testamenti Factio—De Testibus—De Hæredibus Instituendis—Divisio Hæreditatis—De Hæredum Qualitate et Differentia.

§ 1210.

- Universal means of acquisition.** It has been seen that the *modi acquirendi civilis* are *singulares* and *universales*,—the former consisting in *donatio*, *usucapio*, *legatum*, and *fidei commissum*, has already been discussed; the latter or universal modes of acquisition, on the other hand, are the *acquisitio hæreditatis* (*hæreditas*) or *successio hæreditaria*, for whoso deduces a right from another is a successor, in the general acceptation of the term.
- Succession.**
- The inheritance.** Julianus defines *hæreditas* to be *nihil aliud quam successio in universum jus quod defunctus habuerit*,¹ and uses the word in the abstract sense of inheriting, not of the corporeal inheritance itself, but in the right of taking it.

§ 1211.

- Hæreditas, what.** *Hæreditas*, in its *sensu objectivo*, comprehends the *entire estate* left by the deceased, or *complexus bonorum defuncti*;² *sensu subjectivo*, it is the *jus hæreditarium*, or *right* attaching thereupon.
- The right of inheritance.** This *jus hæreditarium* consists partly in the right of appropriating an inheritance to the exclusion of others, partly in the right accruing to the individual in one already acquired. An *hæreditas* is termed *delata* when there exists a *titulus* only, that is, the right or capacity to acquire; this arises when the testator has nominated an heir and has died, in which case the right of inheritance is a mere *jus in rem* (*scilicet*), in *hæreditatem jacentem*; but the *hæreditas* is said to be *adquisita* when it has been administered to, and taken possession of, or where the law vests it without such administration, and such acquisition is termed *successio hæreditaria*, or *successio sensu stricto*.
- Hæreditas delata.**
- Adquisita, what.**

¹ P. 50, 17, 6, § 2.

² The Germans have very appropriate words for this expression—*Vernachlassenschaft*, *Verlassenschaft*, *Nachlass*—inadequately conveyed by the English terms “estate,” or “goods;” to which, moreover,

must be added, of the deceased, to avoid misconception. The word *relicta* used as a general term, would include the entire estate of a deceased, whether consisting of moveables, immoveables, or of both together.

The *titulus* to an inheritance may be *ex testamento* when the inheritance is taken under a will, and is then termed *testamentaria*; and the deceased die *testate*; or *ex lege*, by the mere operation of the general law, and is then termed *legitima, sive ab intestato*; for a testament, it will be seen, may be termed a particular law, or made under a particular law *in hanc finem*, and is a privilege, since the general law designates the degrees of relationship by which the property in an inheritance is to be ruled as well as the amounts of respective interests, whereas a testament possesses greater latitude, and especially supersedes the general law; but a testament, considered as a contract, is *ex parte*, for there is a power given to accept, which the heir does not do till *after* the testator's death; for if he did so *before* that event, it would be a *hereditas pactitia*, and void, for that reason, by the Roman law:¹ nevertheless, inasmuch as the heir may or may not accept the inheritance, there is some resemblance between a contract and a will; hence, there is some similitude in the laws by which both are ruled.

The title of inheritance by will;
by law;

Lastly, *successio* may be, in virtue of the *bonorum possessio*, granted by the prætor in the exercise of his equitable jurisdiction, whereby the informality of a testament was cured or the want of it supplied.

by bonorum possessio.

§ 1212.

The right recognised by civilized societies, which empowers a man to regulate the disposition after his decease, of property acquired during his lifetime, is a restriction of the general and natural law of occupancy, for although a man by industry may gain an exclusive right to any given thing so long as he can make use of it, and maintain himself in the possession of it against others, yet, so soon as death shall have removed him, his property reemerges into the common stock, and becomes again subject by the law of nature to the title by occupancy. In civilized society, however, this title would evidently create eternal confusion, strife, and internal broils, the strongest ultimately obtaining possession of the property of the deceased, and so on, on his decease, and that of those who had subsequently gained the possession by the same violent means. On the other hand, if the absolute right to regulate the disposition of property after death be admitted, it may be a question as to whether there should not exist an equal right of determining the succession to it arbitrarily for an indefinite period. At the same time, then, that this power is admitted by the municipal laws of all civilized nations, it has been found convenient and politic to limit it by positive laws, allowing the deceased to dispose of his property after death to a certain extent; and, "if he neglect to do so, or be not permitted to

Origin of testaments.

The right of occupancy.

¹ The Germans admit this third species of mode of acquisition, the heir being termed *heres pactitius*, whereof hereafter. The Mahomedans likewise.—Baillie, Moohummudan Law of Inheritance, p. 17; Com. on the Sirajyyah, by Sir W. Jones, 4th ed. vol. iii. p. 558.

Blackstone's
view.

make any disposition at all, the municipal law of the country," says Blackstone, "then steps in and declares who shall be the successor, representative, or heir of the deceased, that is, who alone shall have the right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion."

Fictio unitatis
personarum.

The civil law¹ has endeavoured to remedy the anomaly of inheritance, by the fiction of considering the father and son to be the same person, and that the inheritance does not in fact descend, but continues in the hands of the survivor. *In suis hæreditibus evidentiùs apparet continuationem dominii eo rem perducere, ut nulla videatur hæreditas fuisse, quasi olim hi domini essent, qui etiam vivo patre quodammodo domini existimantur unde etiam filius familias appellabatur sicut paterfamilias.* The rule that *bona vacantia* escheat to the Crown is founded on the natural law of occupancy, for when no disposition of property has been made by the deceased, and none such heirs as the municipal laws require exist, the property lapses to the sovereign of the state, who, as representative of the nation, takes such *bona vacantia* into possession, and administers them for the good of the nation at large, of which every member is supposed to have his proportion of benefit.

Bona vacantia
escheat to the
Crown.

Although it may be presumed that wills were unknown among half-civilized nations, yet in some cases it would appear that a legal succession was acknowledged. Thus, Tacitus² asserts that the Germans made no wills, but that the children succeeded as a matter of course to the heritage of the father; not, it is presumed, on so subtle a fiction as that of the civil law, but rather upon the more practical principle of their being the first occupants on the father's death, and having the best claim to the benefits of the industry of their deceased parent, whom they had probably assisted in his labours during his life. The known rule of the Jewish law favours this view, for we find Abraham expressly declaring that, "since God had given him no seed, his steward Eliezer, one born in his house, was his heir,"³ being in the place of a son, and who had assisted him in word and deed during his lifetime. From this state of things the transition to formal testaments may easily be conceived, towards which a declaration on the deathbed would be the first step. This would in time be followed by an earlier declaration and understanding with the children, as we find a son claiming, during his father's lifetime, the portion he would receive at his father's death. For greater certainty, this oral declaration would be superseded by reducing the same to writing, when habit and civilization had rendered the practice of writing more easy and usual. To this step we may readily conceive that formalities and other improvements would be added with a view to prevent fraud. This system, more or less perfected, and varying according to local customs, has rendered a system of complete testation

The ancient
Germans made
no wills.

The Hebrews.

¹ P. 28, 2, 11.

² De mor. Germ. c. 20.

³ Gen. xv. 3.

universal,—the origin of which few scrutinize, satisfied with the fact, the more or less so as they happen to be benefited by it, or the reverse.

§ 1213.

The first nation who reduced the law of succession and testament into any fixed and systematic form appears to have been the Greek, into which Solon¹ introduced it, and whence the Romans borrowed this, as well as their other laws, and so improved it that it has remained the foundation of the system of all nations down to the present time.

The Greeks introduced the system of wills.

Roman testaments were anciently of two descriptions, those made *in pace*, and those made *in procinctu*,² and both are referable to the highest antiquity, so much so as to have become obsolete even before the age of the Twelve Tables. Plutarch³ mentions the latter having been made under M. Curiolanius, who lived before the Decemvirs, but the same author mentions *testamenta in pace* having been made under the kings,⁴ for Tarrutius, who lived under Ancus Marcus, is said *τελευτήσας, ἀπολύψαι κληρονόμον* to have left Lawrentia, the prostitute, his heiress by his last will;⁵ it is therefore an error to suppose that these species of testaments were incorporated into the Twelve Tables in imitation of the law of Attica.

Roman testaments were of two sorts.

A testament, according to the Roman law, is defined by Modestinus to be the legal declaration of our will concerning that which every one desires to be done after his death.⁶ *Testamentum est voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit*,⁷ it is *testatio mentis*,⁸ and not derived, as is vulgarly supposed, from the witnesses; thus, *testari* means to leave by will. Testaments are, therefore, not founded on natural, but on civil law; for *justa*, in this sense, means *legalis*.

§ 1214.

Testaments were originally considered of a nature so important as to require an express law in every particular case to render them legal, in the same way as in England, at the present day, the legislature reserves to itself the power of passing a particular law in each individual case to dissolve the otherwise perpetual contract of marriage; in like manner, *testamenta in pace* were made in the *comitiis calatis (convocatis)*, which probably proceeded on the idea that, on the death of the party, the property he left entered again into the common stock, and that its disposition could therefore only be directed and alienated from the public by

Testaments made originally in the comitia, and termed in pace.

¹ Plato, de leg. 11, 679; Plut. Solon, 90; Dem. Orat. in Shept. 2, 983.

² The Gloss mentions *endo procinctu*; Justinian calls them *testamenta procincta*.

³ Curiol. 9. ⁴ In vit. Romuli, 5.

⁵ *Hæreditas testamento delata* vid. Perizon ad L. Voc. p. 134.

⁶ P. 28, 1, 1. Some consider this rather a definition of testation generally than of a testament, because it applies equally to a codicil or legacy, whereas a testament must contain the direct appointment of an heir.

⁷ I. 2, 20, § 34.

⁸ I. 2, 1c, pr.

Their form.

its consent, which may, indeed, be deduced from the form of words used, *velitis jubeatis Quirites uti*, L. Valerius and Titio *tam jure legeque filius sibi siet, quam si ex eo patre matreque familias ejus natus esset, utique ei vitæ necisque in eum potestas siet, uti patri endo filio, est hæc ita uti dixi, ita vos quirites rogo*;¹ the votes in such cases were probably given by silence, that is, by no one opposing the measure, as it is morally impossible that formal votes could have been collected in each case, though indeed it is probable, that more successions were by law than testament.²

Why so made.

These *comitia*, termed from the Greek *καλέω*, or possibly from the kindred Pelasgic word of like import, to convoke, and hence termed also *convocata*, were assembled by the lictors, *curiatim*, or *in curias*, and the *centuriata*, by the sound of a trumpet, for the institution of a member of the college of the pontifices, or for the purpose of inaugurating the *rex sacrorum* or *flamen*, the principle being that inasmuch as a law can only be superseded by a law,³ on which ground many suppose that *pacta successoria* were void, because *privatorum cautio legum auctoritate non censebantur*,⁴ and *jus publicum privatorum pactis mutari non poterat*;⁵ moreover, nothing could be changed in the *sacra privata* without the intervention of the pontifices in whose province such matters lay, and in this case the estate was passed to the heir; in like manner, the pontifices were to be consulted in cases of adrogation,⁶ this, then, is probably the better reason.

§ 1215.

Testamentum in procinctu.

As the Romans at an early period were almost constantly concerned in war, and as persons about to enter into battle felt, more than any others, the necessity of making their wills, a field testament called *in procinctu*⁷ was, *ex necessitate rei*, considered of equal validity with that made in time of peace or at home in the *comitia calata*. At this period of the Roman history, the army, too, was composed of persons of a better class than in later times,—in short, of those belonging to the National Assembly, who, standing *in procinctu*, before the army arrayed, or *cinctu gabino*,⁸—hence the term, with their shields on their arms and cloaks wrapped round their shoulders, *saga adcingentes*, named their heirs in the hearing of three or four persons,⁹—attested by the then customary auspices and religious observances, which was the origin of the privileged will of military men, which will be noticed later in its individual bearings and effects.

Manner and form.

¹ Aul. Gell. N. A. 5, 19; Id. 15, 27.

² Thomasius, Diss. de princ. init. succ.

test. § 12.

³ Bynkershoek, obs. 2, 2, p. 113.

⁴ P. 38, 16, 16.

⁵ P. 2, 14, 38; Theophil. ad I. 2, 10, § 1.

⁶ Cic. pro domo 13, vide et § 704, h. op.

⁷ Serv. ad Virgil. Æn. 7, 612; Vell. Patern. 2, 5, as to the emperors using this

gabini cinctu, Liv. 8, 9, 10 & 10, 7, 28, 29 & 26, 11.

⁸ Gaius, 2, 101; Theophil. 2, 10, § 1; Festus v. *procinctu*.

⁹ Plut. in Carol. 9, *τρίων καὶ τεττάρων*, it is doubted whether this should be *καὶ* or *ἢ*, whether either may not be conjunctive in point of fact, if seven witnesses were not required.

An interesting fragment¹ still exists in which the ceremony is described:—(Ut) in exercitu . . . m imp . . . umque erat in tabernaculo in sella . . . ensa auspicabatur coram exercitu pullis e cavea libertatis² . . . circa sellam suam . . . obnuntiatio a . . . (p)ullum . . . mum quisquis . . . tripudi³ . . . ntia. Silentio deinde facto, residebat et dicebat. Equites et pedites nomenque Latinum . . . le(s) cincti armati paludati . . . estis secuti . . . dum sinistrum solistinum quisquis vestrum viderit . . . Deinde . . . obnuntiatio dicebait . . . uti placet a legionibus invocarentur faciantque quod (ipse) sperabit⁴ . . . e(imp) . fidemque m . . . ducat salutareque. Si et viro suo caprælium⁴ ineant. Deinde exercitu in aciem educto iterum . . . tur. Interim ea mora utebantur qui testamenta in procinctu facere volebant.

Ut in exercitum *jus imperiumque* erat, in tabernaculo in sella sedens auspicabatur coram exercitu, pullis e cavea liberatis *in locum* circa sellam suam. *Nuspiam* obnuntiatio *aiebat* “Pullum solistimum quisquis videris tripudium, annuntia.” Silentio deinde facto residebat et dicebat “Equites et pedites nomenque Latinum, *qualescunque* armati paludatique *adestis, sicubi tripudium* sinistrum solistimum quis vestrum viderit, *annuntiatio*.” Deinde *nuspiam* obnuntiatio dicebat “*Dii, si* placet, a legionibus invocentur, faciant que quod *iis imperabitur: quod in rem publicam* fidemque *maxime* conducat salutareque siet. Viros voca: prælium ineant.” Deinde exercitu in aciem educto iterum *auspicatur*. Interim eâ morâ utebantur qui testamenta in procinctu facere volebant.⁵

If the witnesses were then really seven, the sacred rites were duly observed. There appears no material difference between this testament and that made in time of peace; there were repre-

¹ Sabidius com. xii. salior. vid. Scholiasts on Virgil, published by Angelo Majo.

² The Codex, according to Mai, seemed to have libertatis.

³ Tripudiantia is not the MS. reading, as Mai observes, there being a space for about four letters.

⁴ So in the MS. Mai.

⁵ Which may be rendered as follows:—According as his jurisdiction and command over the army authorized him, he used to sit in a seat in his tent, and to take the auspices in the presence of the army, the fowls being liberated from the cage into the space around his chair. An adverse augury not having been announced anywhere, he said,—“Whosoever has seen a fowl feeding greedily, so that the corn falls and rebounds from the ground, announce it!” A sacred silence having then ensued, he sat down again, and said,—“Cavalry and infantry, and ye of the Latin nation whosoever being armed, and clothed in your military garments, are here present, if any of you shall have seen an auspicious rebounding of corn from the ground, announce it!” Thereupon, the omen being nowhere announced to be adverse, he said,—“Let the Gods, if it please you, be invoked by the legions, and let them do whatever may be commanded them, as may be most conducive and salutary to the public weal and credit. Call the men, let them draw up in battle-array.” Whereupon, the army being drawn out in line, he again takes the auspices. In the mean time, those who wished to make testaments, in contemplation of battle, profited by this delay.

* The lacunæ have been supplied by the Rev. Churchill Babington, M.A., Fellow of St. John's College, Cambridge, the learned commentator on the mutilated Oration of

Hyperides, lately discovered by Mr. Harris of Alexandria, published at the University Press, Cambridge, 1849.

sentatives from all the *curiæ*, who were necessarily present, and the only difference was in the place and the fact of the *imperator exercitus* performing the religious ceremonies instead of the Flamen.

Testaments of the *populus* presumed.

These wills made *in procinctu* were presumed valid by the tacit consent of the *populus* as νόμοι ἄγραφοι, in the same way as those regularly made in the *comitia* obtained validity as νόμοι ἔγγραφοι.

This testament was only used in times of danger; although, in later times, we find the rule relaxed.¹

As to the duration of the validity of these testaments, it is probable that they were only available *pro re natâ*,²—i. e., if the testator died through the impending danger, but not otherwise; and, in this respect, may be compared to the *donatio mortis causâ*.

§ 1216.

The law introduced by the Twelve Tables.

Before the introduction of the Twelve Tables, it appears that the practice of making testaments in the *comitium* had become obsolete, and it was then enacted,—*Pater familias uti legasset super familiæ pecuniæ tutelæve suæ rei ita jus esto*,³ giving a general power of testation, and dispensing with the former troublesome solemnities, but prescribing no particular form, which it left to the ingenuity of the patricians, then the lawyers of the time, who, assimilating this to other transfers of property or family, introduced the form *per æs et libram*, or the fictitious sale before so often alluded to, at the same time it is supposed, as the *legis actiones* were promulgated by *Flavius* and *Ælius* in this mode, so things were done *familiæ Mancipatio* and *Mancipatio testamenti*; in this there were present the *familiæ emptor*, the *libripens*, and *quinque testes*, Roman citizens of full age, in whose presence a fictitious sale of the inheritance was effected;⁴ indeed, some suppose this form to have existed in the Twelve Tables, *qui si sinit testari libripensve fuerit, ni testimonium fariatur improbus intestabilisque esto*, but it is agreed that it did not allude to wills, but to those admitted as witnesses, or *libripendentes*; and, again, *qui nexum faciet mancipiumque, ut lingua nuncupasset, ita jus esto*, but this does not refer to wills, but to mancipations in general. To return to the form of testation, the testator holding the tablets said,—*Uti in his tabulis cerisve scripta sunt, ita do, ita lego, ita testor, ita que vos Quirites testimonium præbitote*⁵ *cera*, alluding to the wax with which the tablet was covered and not the seal; the last words contained the testing clause, whereupon the testator touched the ears of the witnesses,⁶ in token that they should hear and bear witness to

Testamentum per æs et libram.

Required five witnesses, a libripens, and the familiæ emptor.

¹ *Cæsar* de Bell. Gall. 1, 39; *Flor.* 3, 10.

² *Cic.* de Orat. 1, 53; *Paterc.* l. c.

³ *Ulp.* Fr. 11, 14; *P.* 50, 16, 53, pr.; I. 2, 22, pr.; *Nov.* 22, 2; *Cic.* de Juv. 2, 50; *Auct.* ad Herenn. 1, 13.

⁴ *Quinct.* Decl. 308.

⁵ *Ulp.* Fr. 20, 9; *Isidorus*, Orig. 4, 24.

⁶ Ζυγὰ καὶ ἀσάβρια, καρπισμόν τε, καὶ τὰ τῶν ὄτων ἐπιψάνσεις, *Clem.* Alex. Strom. 5, p. 574.

his deed, nor were they called upon to subscribe their names, till this was in later times required by the prætor,¹ probably with a view that they might subsequently be found and known if required.

The Mahomedan will² required two credible witnesses of the Mussulman faith, if such could be had, but otherwise when travelling of a different tribe or faith. They may be required to make oath not to betray their trust; and if they be suspected of having done so, other witnesses may be adduced to contradict them.

The Mahomedan law requires two witnesses,

The English law now requires, by the last Will Act,³ that there should be two witnesses, present together at the same time to render a will valid, who shall see and attest the signature of the testator, or his acknowledgment thereof in writing, otherwise the act is void, and the estate passes to the heirs at law.

so also the English law.

§ 1217.

When the testaments came to be reduced to writing, they were sometimes written by the testator himself, and then called *chirographa* or *holographa*—sometimes by friends, slaves,⁴ or freedmen, and then it was called *allographa*, though often drawn up by legal men, but not by the heir; although there is a middle age adage little flattering to the profession, *a testamento dolus malus et jurisconsultus abesto*, which certainly places us in no very creditable company.

Testamenta chirographa, holographa, et allographa.

The testament must be written in clear legible characters,⁵ *quæ in testamento ita scripta sunt, ut intelligi non possunt, perinde sunt ut si scripta non essent*, and formerly the Latin language was invariably to be used; although, according to Ulpian,⁶ *fidei commissum* would be good if written in Greek. Many tablets might be used as duplicates,⁷ thus, a duplicate might be deposited with friends or in the temple of Vesta, which appears to have been considered by Julius and Augustus Cæsar⁸ as a sort of prerogative office. In England, a will may be recorded and registered at Doctors Commons during the testator's lifetime.⁹

Record of a will in England before death.

§ 1218.

The prætors, by their edict, introduced amended forms of testament, called the *testamentum prætorium*, which superseded the system of mancipation by fictitious sale.

Testamentum prætorium.

The prætorian testament was, nevertheless, of great antiquity; for we find an edict of Verres, as prætor, *si de hæreditate ambigatur et tabulæ testamenti non minus multis signis, quam ex lege*

¹ I. 2, 10, § 2.

² Al Koran Sura 5, intituled "The Table." Sale's translation, p. 89, vide et Al Beidâwi.

³ 1 Vic. 26, 1838, does not apply to wills made before 1838.

⁴ P. 28, 1, 28.

⁵ P. 50, 17, 73, § 3.

⁶ Frag. 25, 9.

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⁷ I. 2, 10, § 13; P. 28, § 1, 24; P. 37, 11, 1, § 5.

⁸ Suet. Jul. Cæs. 83; Id. Oct. 101; Tac. A. 1, 8 & 17.

⁹ Swinb. Pt. 6, § 13, pl. 1. As the will does not take effect till after death, the probate is not issued, for the testator may still alter it. *Voluntas testatoris ambulatoria est usque ad mortem.*

oporteat ad me proferentur secundum tabulas testamenti possessionem hæreditatis dabo,¹ to which Cicero adds, *hoc translatitium est*; "this is adopted from a former edict," lest it might be imagined that Verres introduced the practice.

The prætorian testament required seven witnesses instead of the five formerly necessary; the explanation of this increase in the number is presumed to lie in there having been, in fact, seven persons concerned in the execution of a testament, *per æs et libram*, that is, the five witnesses and the *antestatus* and *libripens*. These seven were required (1) to adscribe their names (2) in the presence of the testator and of one another, (3) and affix their seals,² (4) which the testator must likewise do in their presence, (5) and that *uno contextu*;³ to which Justinian added a sixth requirement that the testator should himself write the name of the heir in his own proper hand;⁴ but the Emperor afterwards revoked this formality.⁵ If the testator could not write, an eighth person was to be called to sign for him in his presence. The usage of making the testament, *uno contextu*, was combined from the old civil law and from that of the prætor; this last sort of testament thus compounded of the ancient civil law, the prætorian edict, and the imperial constitutions, is termed a *testamentum mixtum*, from its being composed of the three forms.

§ 1219.

Solemn, insollemn, privileged, and oral testaments.

By the civil law, a testament is either *privatum* or *publicum*; it might be *solenne*, and common to all the citizens of Rome, or *insolenne*, or *privilegiatum*, attaching to one class only; it might be *scriptum* or *nuncupativum*,⁶ and the solemnities or forms attending it might be of an external or internal nature; these particular details are here considered in their order:—

§ 1220.

The solemn private testament must be formal.

A *testamentum solenne privatum* requires many formalities, a strict observance of which was essential to the validity of the testament; the burden of proof of their omission, however, lay upon him who would impugn the will,⁷ for the presumption of law is, that all formalities have been observed until the reverse is proved.

Some lawyers draw a distinction between a trifling⁸ and a serious omission,⁹ but where is the line to be drawn? It must therefore be assumed that there cannot be in the eye of the law

¹ Cic. in Verr. 1, 45.

² I. 2, 10, § 2.

³ I. 2, 10, § 3.

⁴ C. 6, 23, 28, § 1.

⁵ Nov. 119, 9.

⁶ I. 2, 10, § 14.
⁷ Puf. 2, obs. 144, p. 498; Strube 5, B. S. 46.

⁸ A testament must be sealed, *annulo*, with

a signet ring; suppose it be sealed with a coin? semble, it is void. Leyser sp. 3 med. 6, spec. 355, med. 5, et in supplem. ad spec. 351, vol. 2, p. 209, Decis. Cassell. 2, dec. ult., P. 50, 17, 183, does not apply to a testament.

⁹ As, for instance, the heir being one of the witnesses.

any distinction between the most trifling and the most serious informality,¹ neither can the law recognize *degrees* in correctness.

This testament requires the following formalities :—

1. That it be duly engrossed.
2. That it be duly subscribed by the testator.
3. That it be attested by competent witnesses.
4. That the attestation take place in *conspectu testatoris*.
5. That they be duly summoned.
6. That there be a unity of time and act.
7. That it be duly superscribed and sealed by the witnesses.

§ 1221.

As regards a *testamentum solenne*, it was necessary,—

1. That the testator write his own will,² or dictate the same to another to be written; but the heir³ or legatee is punishable if either of them presume to write it.

Requisites of a testamentum solenne. The engrossment and language of the testament.

By the law, as reformed by Justinian, it is not imperative on the testator to use any particular language, but it must be written with *letters*, not unusual characters, *notis*, and be clear and precise in its meaning. It is not prohibited to write numbers with figures.

The testament may be written on any substance: the Romans used white tablets covered with black wax, which, when scratched off by the style, left the writing white. Ulpian⁴ says a testament could be written upon *charta deletitia*: it appears this can be written on both sides, *ὑποσθόγραφον*. There has been much dispute about this word: some think it was paper with a former writing erased; others that with foreign written matter on the back,—but there can be no doubt that *charta*, *ὑποσθόγραφος*, be it papyrus, paper, or parchment, was a substance which would bear writing on both sides.⁵

2. That the testator subscribe his testament, unless he write the whole himself,⁶ in which case it is called *holographum* (*ὑλόγραφον*) or *chirographum* (*χειρόγραφον*); but if he cannot write, he could get a person to write and sign for him, and the circumstance must be evident upon the face of the instrument as *C. Titius nomine testatoris*.

The subscription.

3. That not less than seven witnesses,⁷ male citizens of Rome, then fourteen years of age at least, qualified to be present at a solemn act, themselves capable of testation, attest the signature of the testator; thus it is not sufficient that they be merely *credible* witnesses, and hence the exclusion of certain persons,⁸ as follows :—

The attestation. Qualification of witnesses.

¹ Westphal. in Koppen's Archiv. Jurisprud. 2, B. 293; P. 4, 1, 7.

⁶ C. 6, 23, 28.

² I. 2, 10, § 4 & § 12.

⁷ I. 2, 10, § 3, & § 6, 7, 8, 9, 10; X. 3, 26, 10.

³ C. 9, 23, 3.

⁴ P. 37, 11, 4; Leyser Sp. 273, med. 2; Textor diss. de opiathographo, pt. 1, p. 426, sq.

⁵ de Colquhoun.

⁸ Martucius, var. expl. I. C. lib. 1, c. 38; Vinn. ad I. 2, 10, § 6, n. 2, gives other reasons, but this is evidently the more logical.—de Colquhoun.

- Disqualified are women, (a) Women not being permitted to be present at the Roman assemblies, were necessarily excluded from the solemnities which accompanied the act of making a will.¹
- Impuberes, (β) An *impubes* is disqualified for the same reason,—and because he is under the control of another, without whose co-operation he can do no act, even where he alone is concerned.
- Furiosi, (γ) Madmen, *furiosi*, for neither is such an one capable of knowing what he does, or of bearing credible testimony to it afterwards; moreover, his free will is vested in another, his curator.²
- Prodigi, (δ) Prodigals judicially declared to be so, because in the eye of the law they are *quasi furiosi*.³
- Servi, (ε) Slaves,⁴ for they are not recognised as persons in law.
- Peregrini, (ς) Strangers, *peregrini*, are excluded for the like reason.
- Improbī, (η) *Improbī*, or criminal persons who have been condemned for a public offence.⁵ By the imperial constitutions, apostates and heretics are brought under this denomination.⁶
- Muti et sardi, (θ) Deaf and dumb persons, *surdi et muti*.⁷ The first are incapable of hearing the words of mancipation, or, if it be an oral will, of hearing the contents; the latter, because they are incapable of giving testimony when the will is opened. These reasons apply more forcibly to such as are both deaf and dumb; and whoso is born deaf must necessarily be also dumb.⁸
- Cæci, (ι) Blind persons, *cæci*, are not absolutely excluded.⁹ Now, it would appear a blind man can certainly not be a witness to a written will, but can he to a nuncupative one? ¹⁰ In the first case, he can recognise neither the signature of the testator nor his own seal and signature, nor supply by his evidence the testimony of deceased witnesses; in the second, the only objection appears to be that he cannot see the testator,¹¹ and this objection appears fatal from the *incertitudo voluntatis et personæ*. In a written will, if transported after signature, it might be falsified; therefore the witness must see the testator sign. But the law speaks only of written wills; this, therefore, forms no ground in the case of an oral one, and the disqualification must be argued upon the basis of uncertainty as to the person of the testator, and of the fact requiring vision.
- Hæres, (κ) The heir himself is disqualified because he is a *successor juris*, representing the testator, and being the *familiæ emptor*, and interested in the will, and cannot therefore be a witness in his own

¹ P. 2, 10, 6, § 1.² Vid. § 772 et 775, h. op.³ Vid. § 775 et 772, h. op.; P. 27, 10, 1; P. 26, 5, 12; P. 50, 17, 40.⁴ P. 28, 1, 20, § 10; Id. 22, § 1.⁵ P. 47, 10, 5, § 9; P. 28, 1, 18, § 1 et 26.⁶ C. 1, 7, 3, ch. 4; C. 1, 5, 44. Manichæans and kindred sects are utterly excluded; all other heretics as against ortho-

dox Christians, but their testimony is valid among each other.

⁷ P. 2, 10, 6, § 1.⁸ P. 22, 5, 1, 3, § 2.⁹ Laurich de cæco idoneo in testam. teste; Koch Progr. de con. spectu testatoris.¹⁰ Vin. ad I. 2, 10.¹¹ Wahl. diss. de justa liberos hæredes instit. forma, p. 36; C. 6, 23, 9.

cause *totum negotium, quod agitur testamenti ordinandi gratiâ, creditur inter testatorem, et hæredem agi; hæres sibi testimonium præstaret*,¹ there being a fictitious unity of person between the testator and the heir.

(λ) The paternal power will also constitute an impediment Patria potestas.
under certain circumstances :—

a. The father cannot use his own *filius familias* as witnesses, by reason of unity of person ; and,

b. *E converso*, the testator must not be under the paternal power of the witness, for it has been seen that a *filius familias* can dispose by will of his *peculium castrense* or *quasi castrense*.²

c. The heir and the witness must not be under the same paternal power ; a *filius familias* cannot be instituted heir, and his *pater familias* be one of the witnesses, on account of the unity of person ; but mere consanguinity is no impediment,—thus, sons who have passed from under the paternal power of the testator can be witnesses, or the sons of an emancipated son, or a son who is not instituted heir can witness the will of his mother or his maternal grandfather. Even so little is the connexion of witnesses among themselves an impediment,—thus, a *pater* and *filius familias* can witness the testament of a third person, nor would a *pater* and his six *filius familias* be considered to be one person, and *legatarii* or *fidei commissarii singulares* are good witness to written or oral testaments, for they are not *juris successores*.³ Mistakes, however, as to the person or their quality have been held not to invalidate the act, thus a man bond, but reputed free, or a woman in man's clothes supposed to be a man, would not invalidate the testament which they signed as witnesses.

Error of person or condition does not invalidate the act.

4. The testament must be signed in sight of the witnesses, *in conspectu testatoris testimoniorum officio fungi*.⁴ The signification of the word *conspectus* has been disputed,—some supposing it to be the mere presence, others the actual sight, for it may be dark, or the will executed behind a curtain ; again, it is doubted whether the testator and witnesses must reciprocally see each other. Now, if the word *conspectus* rather imports actual view than mere presence, which would be devoid of sufficient certainty, the object is proof of a fact after death, therefore it must be immaterial whether the testator see his witnesses or not, so long as they see him perform the act of signing, so as to be able to bear testimony thereto ; hence it follows that there must be sufficient light in the room, and that the witnesses may look through the bed-curtain to *see* the testator sign without being *seen* ; as regards the testator, then, it suffices that *conspectus* be construed *presence*, but as regards the witnesses, it must be construed *view*.⁵

Conspectus testatoris.

¹ I. 2, 10, § 10.

² § 12, h. op. ; I. 2, 10, § 9, contra ; P. 28, 1, 20, § 2. These two passages

cannot be reconciled ; the latter is probably corrupt.

³ I. 2, 10, § 11.

⁴ de Colquhoun.

⁵ C. 6, 23, 9.

Rogatio testium.

5. The witnesses must have been summoned specially for the purpose, *specialiter rogati*, because the fact of a special summons impresses the circumstances on the mind; hence, if they were fortuitously together, they must be then especially requested to act as witnesses; the origin of this *rogatio* is to be sought in the quiritian transfer by sale often before alluded to. On one Domitianus Labeo asking Juventius Celsus—*An testium numero habendus sit is, qui cum rogatus esset ad testamentum scribendum, idem quoque cum tabulas scripsisset, signaverit?* Celsus answered,—*Aut non intelligo, quid sit, de quo me consuleris, aut valde stulta est consultatio tua. Plus enim quam ridiculum est, dubitare, an aliquis jure testis adhibitus sit, quoniam idem et tabulas testamenti scripsit;*¹ hence silly questions are, in jurisprudence, termed *questiones domitianæ*, and coarse answers *responsiones celsinæ*.

Unitas actus et temporis.

6. The *unitas temporis et actus*, otherwise called *unus contextus*, was another indispensable requisite. The *unitas temporis* applied not to the writing of the testament, but to its external formalities, for the testator might be as long as he pleased composing it; but no business of a description foreign to the object for which the party was assembled must intervene, such as a bargain or the like, for hereby the *unitas actus testandi* is interrupted, and it is necessary the witnesses and testators should remain together until all is finished.

In a nuncupative will, the *actus* began when the testator called upon the witnesses to give ear, and ended when he had finished his declaration.

In a written will, it began when the testator called for the attention of the witnesses, and ended when the last had signed.²

Adsignatio.

7. The testator and witnesses must seal and sign after the testator. The first must be done with a signet, whereupon there is some device, so that it may readily be recognised, but all might use the same, a signet ring being *symbolon* or type of stability;³ but a notary must use his own seal,⁴ for that is of public authority: these seals were exterior upon the linen in which the tablets were enveloped to prevent their being opened and the contents divulged, lest the heir should be induced to hasten the falling in of the inheritance by undue means.

It is a matter of doubt whether the witnesses were required *subscribere* or *superscribere*, that is, whether they wrote on the tablet after the testator, or outside opposite to their respective seals, or both.

The word *adsignare* is used in the Pandects, but *subscribere* in the Institutes. *Superscriptio* might be alone sufficient, but *subscriptio* would evidently not be so; for if the witnesses signed at the foot or end, and not outside, it would be impossible to ascertain who the witnesses are to summon them for the verification of their seals, until the testament had been opened.

¹ P. 28, 1, 27.

² C. 6, 23, 21.

³ P. 28, 1, 22, § 5.

⁴ Nov. 73, 5 & 6.

It is possible that, in Justinian's age, testaments were not so carefully sealed up under cover ; hence the word *adsignare* gave place to *subscribere*, for they must write on the will itself if not enclosed ; and *adsignare*, to affix a signature, is nearer to superscription than to subscription.¹

§ 1222.

It may easily happen that some of the witnesses may be absent on the opening of the will ; this, however, will not invalidate the will,² for they may be made to come and verify their seals by the prætor ; and if the major part of them be found, the testament may be resigned and recited, or the tablets may be sent to them to be so acknowledged, to avoid inconvenience and damage to their affairs. *Tabulæ testamenti aperiuntur hoc modo, ut testes, vel maxima pars eorum, adhibeantur, qui signaverunt testamentum, ita ut, agnitis signis, rupto lino aperiatur et recitatur.*

The opening of the will.

§ 1223.

The capacity of the witnesses is to be regarded, not at the time of the testator's death, but at the time they bore witness ; a testament will not, therefore, be invalidated by any subsequent change in the civil condition of the witness ; thus a witness may have undergone a *capitis deminutio* subsequently, been taken captive, &c., nor for any incapacity at the time itself ; thus, if the witness were supposed to be of full age, whereas he was not, or supposed free when he was in fact bond, yet, if generally reputed of full age or free, he will be adjudged a valid witness.

The capacity of witnesses to be regarded at the time of execution.

It has been observed, that though the heir and his family are excluded on account of the unity of person, yet legatees were admissible as good witnesses ; also a *fidei commissarius particularis*, because he cannot be *juris successor* ; not so a *fidei commissarius universalis*, who could be so.

If any of these solemnities were omitted the testament was invalidated, nor could it be supported as a nuncupative will, if it can be reasonably presumed that the testator had the intention of expressing himself in writing.

Wood, in his *Institute of the Civil Law*,³ observes upon this passage, " Hence hath arose a question in conscience and natural reason, whether advantage may be taken against a testament for want of a solemnity required by law, when it plainly appears to be the testator's mind that the estate should pass according to the declaration therein mentioned ? Those that deny it procede upon⁴ the supposition that testaments are the effect of a natural right ; others that maintain the affirmative insist, that for prevention of

Wood's view.

¹ P. 28, 1, 22, § 4 ; I. 2, 10, § 3.

² P. 29, 3, 4, § 6 & 7 ; Paulus R. S. 4, 6, 1 ; P. 28, 1, 22, § 4 ; P. 28, 1, 30.

³ L. 2, c. 4, p. 178.

⁴ Which, it has been seen, is clearly not the case.

frauds in testaments, it is necessary to keep up the strict solemnities prescribed by law. But if an heir has entered upon an estate by virtue of some testament defective in the solemnity, if he is satisfied that such was the intent of the testator, he is not bound to relinquish the estate, if the heir-at-law, out of a generosity of mind, or through negligence, will not make any claim to it."

§ 1224.

Advantages of a written will.

Independently of the advantages of proof supplied by a written will, there is the advantage which the testator has of concealing till his death the name of his heir, and the other dispositions contained in it from the witnesses;¹ neither can the heir be obligated to open the testament until the ninth day after the decease of the testator,² after which it may be opened by him, or by any who may have an interest to see or hear it; the facility, too, with which duplicates may be made materially enhances the advantages of the written testament.³

§ 1225.

Oral will.

Nuncupative testaments⁴ are such as at the time of the making were not committed to writing,—for if this be done afterwards, *pro memoria* and proof, it is still no written⁵ will, but a nuncupative one; they were made by declaration of will before seven witnesses,—thus they differ in nothing from written wills in respect of solemnities,⁶ except that they need not be reduced to writing, and that the witnesses neither seal nor superscribe them, it being sufficient that they hear them read, see the testator, and understand whom he appoints his heir; their efficacy is equal to that of a written testament, their antiquity greater, they having been probably in use before the invention of letters, at the same time, their certainty is naturally much less.

§ 1226.

Civilians enjoying military privileges.

Other persons, by a parity of circumstances, were also entitled to restricted military privileges,—viz., all civilians attached to the army, chirurgeons, the members of the commissariat, field preachers, bakers, accountants, and the like—nay, even camp followers, soldiers' wives, volunteers, and the like. Such persons enjoyed this privilege only in impending danger, *si in hostico (hostili) loco deprehenduntur*;⁷ hence the army must be in battle-array—the fight imminent—after it is in retreat, or in a besieged place, and the testator must die on that occasion.

Before the age of Ulpian deaf and dumb civilians could not

¹ C. 6, 23, 21.

² Nov. 113, 5.

³ I. 2, 10, § 13, so termed *quid hæredem nuncupavit*.

⁴ I. 2, 10, § 13.

⁵ C. 6, 23, 26.

⁶ C. 6, 23, 26.

⁷ Ulpian, P. 29, 1, 44; C. 6, 21, 16; Westphal. Test. § 729.

testate; but a soldier who, in Ulpian's age, had become deaf and dumb from wounds, and had not obtained his discharge, *mutus et surdus nondum missus* (for such person could hardly be available for military purposes), might do so in virtue of his military privilege. Now Justinian gave civilians this privilege, and Höpfner¹ thinks that Tribonian copied the passage of Ulpian into the Institutes,² *quin etiam mutus et surdus miles testamentum facere potest*, without reflecting that the general law covered them. But here the difficulty may perhaps be also explained by supposing not merely that they could testate, but could do so militarily; or it may relate to the former sentence, where the words *ita locutus est* are used referring to the testator, and *audisse* to the witnesses, for it is a question of an oral will; and, inasmuch as the deaf and dumb soldier could not speak, he may have been allowed to designate his heir by intelligible signs without writing.³

§ 1227.

A testamentum, *minus solenne scriptum*, was one which might be valid notwithstanding the omission of all or some of the above solemnities; the most highly privileged of this class was the *testamentum militare*, on account of the unsettled life, constant dangers, and unskilfulness in letters of the soldier, this privilege existed before the Twelve Tables; this testament was then made in the manner described, more particularly where the *testamentum in procinctu factum* is treated of.⁴ *Unitas actus* is indispensable.

In Cicero's time it had ceased to exist; but Julius Cæsar, Titus, Domitian, Nerva, and Trajan revived this privilege, and Ulpian⁵ tells us that it was founded in the constitutions of the emperors.

Before Justinian's time it was clear that the soldier might use his privilege at any time, whether he were about to go into battle or not, indeed, so long as he was a soldier; but after that period it was limited to his being *in expeditione*, upon which term the question rests: some maintain this to signify that he must either be in camp⁶ or garrison on the frontier, while others extend it to those in winter quarters or inland garrison upon duty, because they may be called upon to march on sudden expedition; but the most general opinion is, that the privilege extends not only to that period when he shall be *extra expeditionem* or *extra castra*, on furlough, but to a year, over and above the date at which he shall have quitted the service, so that if he die within a year, the testament made in the time of war is still valid as a privileged testa-

In solemn testaments.
Testamentum militare.

Obsolete, but revived under Julius Cæsar.

When a soldier's privilege applied.

¹ § 456.

² I. 2, 11, § 2.

³ de Colquhoun.

⁴ Vid. § 1211, h. op. Justinian calls it *imperitia*; Trajan, *simplicitas militum*; but neither are correct, because this is equally applicable to other ignorant or simple people. Ulpian is correct, however, in attributing it

to the *functio periculorum*,—that is, the impossibility, by reason of their dangerous occupation, of observing the legal solemnities.

⁵ Frag. 239, 2.

⁶ I. 2, 11, § 3. Theophylus says, soldiers could not testate militarily, *στράταις ἰσθῆα διατείνεσθαι ἀνάγκη*. Thib. l. c. § 242.

ment; his discharge must, however, be with honor,¹ *missio honesta*, or upon account of sickness, *missio causaria*, not for cowardice or any misdemeanor, *missio ignominiosa*, for this invalidates it from that moment; moreover, though the testament have been made before the war without the necessary solemnities, and he add to, or alter it in war time, it enjoys the privilege as a new testament. But if the soldier live in his *own house*,² or in other places where there is no necessity of being in readiness for an expedition or any fear of danger, he does not enjoy the privilege of being exempted from the usual solemnities.

In what the
privileges con-
sisted.

The privileges consisted chiefly in the following points:—

1. He may die partly testate and partly³ intestate; for if he appoint an heir to part of his estate, the residue shall devolve on his heir at law.

2. He may appoint heirs till a certain time, and from a certain time,⁴ *in diem* and *ex die*.

3. He may die with more wills than one,⁵ which, if not contradictory, are all valid, otherwise it depends on his declaration, which if it was in favor of many, these are treated as co-heirs.

4. He may pass over his children, without any necessity of disinheriting them by name,⁶ without risk of a *querela nullitatis* or *inofficiosi*.

5. Strangers (non-citizens) and women⁷ may be witnesses to his will; and two are sufficient, though they are not specially summoned, and though they neither subscribe nor seal in the presence of the testator, indeed, though there be no witnesses at all, if the intention of the soldier be proved to have been expressed by words or writing, it is sufficient. Such writing may even be written in blood on his scabbard or shield,⁸ or in the dust with his sword, if he be at the point of death; but if he say in common conversation that such an one shall be his heir, it is looked upon rather as an artful way of pleasing, or the effect of sudden transport, than as a design of making his will,—this is a question of *animus testandi*, or intention.⁹

6. He may name a direct heir in a codicil.¹⁰

7. He may substitute whom he will.¹¹

8. His will is not avoided by the subsequent birth of a posthumous child, if he expected at the time he made it such might be the case.¹²

9. He can name as heirs persons otherwise incapable of being so, as *peregrini* and *collegia illicita*. The exceptions to this are:—That he cannot appoint heretics heirs;¹³ he is bound by the

¹ P. 29, 1, 26.

² I. 2, 11, pr.

³ P. 29, 1, 6.

⁴ P. 29, 1, 19; Höpfner, Com. ed. Weber, § 454.

⁵ Ibid.

⁶ C. 6, 21, 19.

⁷ I. 2, 11, pr.

⁸ C. 6, 21, 15.

⁹ P. 29, 1, 24; I. 2, 11, § 1.

¹⁰ Höpfner, l. c.

¹¹ Vid. substitution mil. h. op.

¹² C. 6, 21, 10; P. 29, 1, 7; Nov. 115, 3 & 123, 19.

¹³ C. 1, 5, 22.

Lex Ælia Sentia;¹ he cannot make a captatorial disposition.² The *conditio jurisjurandi*³ was illegal, and every *turpis conditio*. A *mulier in quam turpis suspicio cadere potest*,⁴ or *quæ stupro cognita in contubernio militis fuit*;⁵ a civilian could, however, do so, except in a case of adultery;⁶ but a soldier could bequeath to his concubine.⁷

10. He may infringe the Falcidian fourth with impunity.

Lastly, though a *filius familias* can make no testament, be he soldier, veteran, or *paganus*—in short, though he come within any of the above exceptions, yet he may so dispose of his *peculium castrense*, or *quasi castrense*, as to exclude his parents and children from any remedy by the *querela inofficiosi testamenti*; and if he be in a military position, so as to admit him under other circumstances to the military privileges, he can even make an unsolemn will with regard to such property, otherwise he is bound by the usual formalities, for the property of itself does not confer them.

Military privileges of a fil. fam.

§ 1228.

In addition to the military testament, there were others that were privileged or exempted from the ordinary formalities; and, first, *testamentum principi aut judici oblatum*. Such testament was termed *public*, and was usually legalized in the following way: in the first case, it was either declared to the prince in writing, in which case it was registered, or the testator declared his⁸ will before him, or his deputy empowered in this behalf at the testator's request, or delivered to such person in writing; or, in the latter case, before the judge when the will is delivered to him in writing to be registered, or orally declared before him, or his deputy empowered in this behalf at the testator's request,—here the prince or judge supplies the place of formalities, and witnesses are dispensed with, but the will must be in other respects formal, and, although the prince or judge could receive the testation by deputy, yet the testator could not depute one to deliver or declare his will before the proper authority—it must, moreover, if in writing, and the testator be illiterate, be read before such authority, or it is invalid. The Canon law requires that it be attested by a notary of the court, or two credible witnesses.⁹

Official testaments.

§ 1229.

Testamentum parentum inter liberos. By this will is understood one by which the ascendants, as father, mother, grand-

Testamentum parentum inter liberos.

¹ P. 29, 1, 29, § 1.

² C. 6, 21, 11.

³ P. 29, 1, 29, § 2; Höpfner, l. c. §

493.

⁴ P. 29, 1, 41, § 1.

⁵ P. 34, 9, 14.

⁶ P. 34, 9, 13; Voet. h. t. n. 3.

⁷ Vryhof. orat. adject. ejusd. obs. I. C.

p. 19; Höpfner, l. c. n. 4.

⁸ C. 6, 23, 19.

⁹ X. 2, 19, 1; X. 2, 20, 28; Müller ad Leyser, 3, obs. 625.

father, or grandmother, declare which child or grandson shall succeed. Constantine, Theodosius, and Justinian, settled this law,¹ which is grounded upon natural love and affection, and to avoid the indecency of children afterwards questioning their parent's will for some trifling omission in point of form (except the *unitas actus*), but it was unknown in the classical age.

Necessary form.

If this was a written will, it was merely necessary that it should be in the handwriting of the testator, or signed by him, together with a date;² but, if nuncupative, two witnesses were required, not for mere formality's sake, but for proof. The proportion of the inheritance destined for each child was to be clearly expressed,—as, “my eldest son shall have a seventh part,”—an exact date being thereto affixed.

Disinherit.

It has been questioned if parents could disinherit their children in this species of testament,—but why not? as it can be done in all other privileged wills. It is to be observed that the testator cannot institute any stranger his heir; but it is a moot point whether he can leave a stranger a legacy. Höpfner, on good grounds, answers negatively; but the example he adduces is badly chosen, for he takes the case of the testator's wife,—now, as the wife might or might not be by fiction *filia familias*, according to the form by which she was married, this probably is the only case in which a person not related by blood to the testator could take part in it.

The difference between this and the *divisio inter liberos* is, that, in the first case, the children are made heirs and inherit *ab intestato*, and, if one get more than another, it is to be considered a prelegacy.³

§ 1230.

Testamenta
rusticorum.

In *testamentis rusticorum*⁴ five witnesses were sufficient, on account of the difficulty of obtaining witnesses in retired spots; but the testament will be void if it were in the power of the testator to have procured seven witnesses, and he only took five or six. Any one witness may subscribe for the others,—this goes on the presumption of the illiterate state of peasantry in general; if, however, the testator could have obtained better educated witnesses, and did not do so, his will will be bad. *Unitas actus* is requisite.

To whom they
apply.

On this head two questions arise,—first, have peasants alone the privilege, or any one living in the country, as for instance, a parish priest, country gentleman, or traveller who falls ill? Höpfner thinks that it extends to these latter also, for the ground on which both claim is the same.⁵

¹ C. 3, 26, 26; C. 6, 23, 21; Nov. 107.

² C. 6, 23, 21, 1; Nov. 107, 1; Puf. 3, obs. 5; Leyser, *op.* 367, med. 3.

³ C. 6, 23, 21, § 1; Stryk. de caut. test. cap. 10, § 22; Puf. 2, obs. 31, § 4;

Boehmer de lib. F. C. onerat. § 7; Walch, controuv. p. 331, § 8, 3.

⁴ C. 6, 23, 31.

⁵ Walch, controuv. p. 333, ed. 3; Höpfner, l. c. cap. 13, § 5.

The second question is, on whom the *onus probandi* lies, in case it be asserted that more than five witnesses, or that better educated ones, could have been found? As the presumption here is against the probability of such being the case, the plaintiff will be bound to prove that there were such witnesses, for the defendant cannot be bound to prove the negative.¹

§ 1231.

Another privileged testament is that made in time of plague;² this originates in the difficulty that would arise in finding seven persons who would assemble to witness the will of one sick of a contagious or epidemic disorder; hence the law allows that they be got one after another as the testator best may, to hear the declaration of his will, or sign it, if in writing. The case given in the law supposes seven witnesses to be assembled to witness a will, and one falls suddenly ill, whereupon the others disperse from fear of contagion, and the *actus* is thereby interrupted.

Testaments made in time of plague and sickness privileged.

This is a moot point,—can the *unitas actus* be dispensed with?³ the law must be interpreted in the affirmative. Many other questions may arise,—the epidemic must be so bad as to deter men from assembling generally. The degree of the contagion must be considered, also whether it was in the testator's house, and if the testator was ill of the epidemic, &c. Again, does the testament lose its force after the cessation of danger, if the testator have not died of it?—some say in a year; the general opinion is, that once good it will remain so, because of the absence of any law to avoid it.⁴

§ 1232.

Intestate heirs who have been excluded by one will, may be reinstated in another and subsequent one, which will be valid notwithstanding some formalities be wanting; as, for instance, when five witnesses only are present. The ground given is the favor shown towards the intestate by the lawgiver.⁵ *Unitas actus* is necessary.

Privileges to heirs ab intestato.

§ 1233.

As it is not likely that the Church would lose anything for want of obtaining a privilege, any testament *ad pias causas* may be informal; under this head come wills in which anything is left to the poor, a church, monastery, or nunnery, hospital, orphan asylum school, provision for poor girls or students, &c., and the pretended ground for allowing the exception is the philanthropy

Privilege in case of a will ad pias causas.

¹ Philippi diss. de test. hom. rural. 2, § 5; Stryk, l. c.; § 9; Brunemann ad L. fin. C. de test.; Contra, Hommel in rhaps. obs. 452, p. 470.

² C. 6, 23, 8. ³ Bachov. ad Treutler, vol. ii. disp. 7, th. 6, lit. 1, p. 281; I. Gothofr. diss. de test.

temp. pestis cond. in op. p. 627, sq.; C. id. 8 & 28; Stryk. l. c. 11, § 3; Leyser, op. 368, med. 1.

⁴ So Thib. l. c. § 848.

⁵ P. 28, 3, 2; C. 6, 23, 21, § 3; P. P. 39, 10, 2.

and piety of the testator, whereas the reverse is the case, for natural affection for the heir, thus passed over to enrich strangers, is thus violated. This testament is good by Canon law,¹ as far as the *pia causa* is concerned, in the absence of all external solemnities, if the contents be only according to law. Some lawyers think two witnesses necessary; the Pope requiring two or three witnesses probably only for proof in case of a nuncupative will. It is this robbery of heirs by oral wills, made *in articulo mortis* before two confessors present, that has been the origin of so much injustice, and created so justly an ill feeling against the priesthood, and which in England has given rise to various statutes calculated to restrain these scandalous impositions; the reason given is as jesuitical as the object of fraud is patent, *quoniam scriptum est in ore duorum vel trium testium stet omne verbum*. The *unitas actus* must, however, be observed.

§ 1234.

Who could
testate.

Disabilities.
Want of citizen-
ship;
Of understand-
ing, by reason of
corporeal de-
fects;
by reason of
crime.

Every one whom the law does not preclude from making a testament, is at liberty to do so; generally, all have the *testamenti factionem* who do not lie under certain peculiar disabilities. The first and indispensable requisite is Roman citizenship: those who do, and those who do not come within this rule, will be seen on reference to a former part of this work.² In the second category may be placed those whose reflecting powers are insufficient; or, thirdly, those whose corporeal ailments form the bar; and, fourthly, those whose crimes have been the cause of depriving them of this privilege.

§ 1235.

Want of
citizenship.

With respect to the first impediment, he who really has the necessary citizenship, but doubts the fact;³ and a son who is ignorant if his father, who is abroad, be dead or not, whether he be a *filius familias* or not, are, it is curious to find, excluded from the testamentary right; but soldiers form an exception from this rule.

These disabilities may be reviewed in the following order:—*Filii familias, servi, captivi, extranei* or *peregrini, impuberes prodigi, furiosi, mentis capti, and muti et surdi criminosi*.

Whoever will make a testament must be either *mater* or *pater*⁴ *familias*. Thus, even a married woman, if not specially prohibited; for the Twelve Tables⁵ say *pater familias uti legasset*, for a *filius familias* cannot make a will even with the concurrence of his father, on account of the unity of person;⁶ an exception

¹ X. 3, 26, 10 & 11; Merenda, contr. 4, 16; Fachin. 4, 3; Zoesius ad Decret. tit. de test. n. 22; Schilter, ex. 8, th. 14; Lauterbach, coll. th. pr. tit. de test. nul. 50; Puf. 2, obs. 172; Struv. de caut. test. 12, § 4.

² § 1221, h. op.

³ P. 28, 1, 15.

⁴ P. 31, 1, 77, 34.

⁵ P. 50, 16, 120.

⁶ I. 2, 12, pr.

arose in later times, when the rights of the *peculium adventitium* became acknowledged, in which case the father's permission enabled the son to dispose of it by will.¹ *Filius testamentum facere non potest, quoniam nihil suum habet, ut testari de eo possit. Sed Divus Augustus M. constituit, ut filius familias de eo peculio quod in castris adquisivit, testamentum facere possit.* The father can confer no privilege on the son which the laws do not authorize; thus, the son can freely dispose of his *peculium castrense* or *quasi castrense*, for he was looked upon as a *pater familias* to the extent of that property, and some would extend this to the *peculium adventitium extraordinarium*, but without sufficient reason.

But if a *pater familias* make his will, and then be arrogated, his testament becomes of none effect, *irritum fit*; a military testament always excepted. If, also, a *filius familias* not within the above exceptions make a will, and subsequently become *sui juris*, his testament is void, for the rule "once good ever good, and once bad ever bad," obtains here; we have, however, seen how far a *filius familias* could give *mortis causâ* with permission of his father, although generally both follow the same rule.

The want of a civil status deprives a man of the power of making a will,—thus slaves laboured under the disability.

Such as are captive with the enemy during their captivity,² Want of civil status. for they are in a state of bondage,—not so if made prisoners by pirates or robbers;³ but if the testator make his will before he be taken, and die in captivity, his will is good, for it was good in the beginning, in addition to which it is good by the Cornelian law, which feigned the citizen to have died at the moment of his being taken prisoner; the third case is this, that a citizen makes his will, is subsequently made prisoner, but regains his freedom and returns, in which case his will is good, *jure postliminii*. Hostages of war⁴ follow the same rules, for they are in the relation of prisoners. A Citizen sent in *exilium* loses his power of testation, for he has undergone a *capitis diminutio* which affects his civil state.

Extranei or *peregrini*, foreigners, formerly called *hostes*,⁵ who are not citizens of Rome, for they were presumed to be enemies, —which law was afterwards repealed.⁶

Foreigners can make valid wills of personalty in England.

§ 1236.

Impuberes could do no legal act *sine auctoritate*, under fourteen Intellectual years of age, or under twelve if females,⁷ for want of judgment; disabilities.

¹ Ulp. Frag. 20, 10.

² I. 2, 12, § 5.

³ P. 28, 1, 12.

⁴ P. 28, 1, 11.

⁵ P. 35, 2, pr.

⁶ C. 6, 59, auth. omnes.

⁷ P. 28, 1, 5.

but a will made upon the last day of the last year after six in the evening shall be esteemed to have been made when the day was expired, nor will his or her subsequently coming of age render it valid.

Prodigi.

Prodigi—those declared so by authority.¹ For this two reasons are assigned,—one, that he is *civiliter furiosus*; others, because he is forbidden the alienation of his property, by which mode (*per æs et libram*) testaments were formerly made. By the thirty-sixth Novella of Leo, the will of a prodigal was declared valid if it be in its tenor reasonable and not extravagant; but this Novella is not received in many continental States, yet the will made before the interdict will be valid.

It has been before remarked that spendthrifts, judicially declared to be so, are unknown to the English law.

Furiosi.

Furiosi may make valid wills in lucid intervals² (*intervalla furoris*), but a stupid man may make a will.

In England.

This is the same in England; but one who is so stupid that he cannot count ten, or have no more sense than a child of ten or eleven years old, is precluded.

Mentis capti.

Mentis capti (idiots), *in adversâ corporis valetudine mentis captus, eo tempore testamentum facere non potest.*³

§ 1237.

Corporeal disabilities.
Muti et surdi.

Muti, surdi, et cæci,—this refers to a bodily rather than a mental disability. A man may be deaf and dumb, or only deaf or only dumb; if both,⁴ he is incapacitated; for, never having had the advantage of an education, he can form no idea of the nature of the act; but a deaf man, *surdus*, may make a testament, written or nuncupative, were he born so or subsequently became so. The *mutus* by nature or disease is not incapacitated from making a written will; but neither of these last could testate *per æs et libram*, because the first could not hear, the latter could not repeat, the name of the *familiæ emptor*.

There is one sweeping exception, in case any of these be proved to have a correct idea of a testament, and can express himself by words or writing, but not by signs.

Cæci.

Cæcus may make his will,⁵ written or nuncupative, a notary or *tabularius*, however, or eight witnesses, must be present. He must not only name, but exactly and circumstantially describe the heir, and make no error in the person. Should he have already made a draft of his testament, it must be read over to him in the presence of the witnesses, and he must declare it to be his last will; the notary and witnesses must then sign and seal. It is advisable,

¹ I. 2, 12, § 2.

² I. 2, 12, § 1.

³ P. 28, 1, 17.

⁴ C. 6, 22, 10.

⁵ C. 6, 23, 8.

but not indispensable, that the testator sign himself; hence the testament of a blind man is a mixture of a nuncupative and written will.

In all the above cases, it must be ascertained that the disease which has produced the corporeal defect have not injured the understanding.

§ 1238.

Criminous persons are incapacitated from testation as a punishment. Disabilities by reason of crime.

Traitors are those who have committed the *crimen perditionis*,¹ that is, have made a hostile attempt on the life or kingdom of the prince. Treason and sedition.

Heretics, or those who fall off from the Christian faith, Apostates,² Jews, Infidels, and Manichæans who acknowledge two beings, a good and an evil, are incapacitated; if this apply to heretics generally, it includes Protestants.³ Heretics.

Those involved in *incestuous marriages*,⁴—their property goes to their children by a former marriage, if any; if there be none, it is confiscated; in this case, a marriage within the degrees prohibited by the Roman law is to be understood.⁵ Incestuous persons.

Libellers.

Libellers.

Capitis damnati,—the property of those condemned to *servi pœnæ* was, before Justinian's time, confiscated in all cases; but by the Novellæ, the *servus pœnæ*⁶ and confiscation of goods⁷ was abolished in case the convict have descendents or ascendants of the first or second degree, otherwise the property vests in the fiscus, but the relations obtain the property by "grace of the law," and not as heirs; consequently, in all these cases, the convict can make no will, having nothing to leave. Convicts.

Manifesti usurii,⁸ notorious usurers, are, by the Canon law, punished by loss of the right of testation, all taking of interest being contrary to the Canon law. Usurers.

§ 1239.

On the other hand, some persons were incapacitated from receiving by will the property left to them. Who could not take under a will.

Foreigners—sons of traitors against the prince⁹—apostates from

¹ C. 9, 8, 5.

² C. 1, 7, 1.

³ C. 1, 57, 4, 5; vid. § 1121, h. op.

⁴ Nov. 12, 1.

⁵ C. 5, 5, 6.

⁶ Nov. 22, 8.

⁷ Nov. 139.

⁸ In. vi. 2.

⁹ The words of this despotic law founded on the *unitas personæ* of the testator and heir, or father and son, are:—*Filii vero ejus quibus vitam Imperitorid specialiter lenitate*

concedimus (paterno enim deberent porire supplicio, in quibus paterni, hoc est, hæreditarii criminis exempla metuuntur) à maternâ vel avitâ omnium, etiam proximorum hæreditate ac successione babeantur alieni, testamentis extraneorum, nihil capiant, sint perpetuo egentes et pauperes, infamia eos paterna semper comitetur, ad nullos prorsus bonores, ad nulla sacramenta perveniant; sint postremo tales, ut bis, perpetuâ egestate sordentibus, sit et mors solatium et vita supplicium. C. 9, 8, 5, § 1.

the Christian faith—heretics (Justinian only alludes to Manichæans) interpreted generally according to Frederick II. and the Canon law¹—the community of Jews (single Jews may be instituted), *corpora illicita*, these were called *institutiones odiosæ*. Lastly, the prince to sustain a litigious title.

Children of
second marriage.

A man or woman who has married again, having children by the first marriage, can leave to all the children of the second marriage a sum equal only to the share of that child of the first marriage who gets least; this applies to all the different modes of transferring property *mortis causâ*, will, dower, legacy, &c.²

Natural chil-
dren.

Although all natural children of another can be appointed, whether *adulterini*, *incestuosi*, or others, none such *incestuosi* and *adulterini* can be instituted by their own parents;³ if they be the issue of an incestuous connexion, they can be instituted; not so, if of an incestuous marriage.⁴ The issue of an adulterous connexion, *stuprum* and *fornicatio*, may be instituted, the legitimate children having first received their legal portions. The natural children by a concubine can be instituted by the mother on an equal footing with those born in wedlock; but the father, if he have legitimate children, can only leave the *naturales* $\frac{1}{2}$; if he have not done so, the legal portion goes to the parents.⁵ It appears unfair that a father might leave the whole residue to a stranger, but only $\frac{1}{2}$ to his natural children; this probably arose in the wish of the Christian emperors to check concubinage; the *naturales* legally had a father, but the other spurious children not having any, were therefore strangers. Persons convicted of adultery by a court of justice could not name each other heirs.⁶

§ 1240.

The division of
the inheritance
must exhaust
the estate;

An inheritance should be so divided that it will divide without a remainder,—for if this were not done, and the residue went to the heir-at-law, the testator would then have died partly testate and partly intestate, *et nemo pro parte testatus, et pro parte intestatus decidere potest*; and Pomponius says,—*earum rerum naturaliter inter se pugna est, testatus et intestatus*,⁷ consequently, he who is instituted for a part, if none be instituted for the residue, gets the whole, or *As*; for *si unum tantum quis ex semisse verbi gratiâ hæredem scripserit totus as in semisse erit*;⁸ but if several be instituted, and no division expressed, the *As* will be equally divided amongst all, and this will be the case when the testator has named his heirs at law testamentary heirs, who would otherwise by law have received unequal proportions.⁹

the whole of
which was
called the *As*.

¹ Auth. cred. C. de hæret. cap. 13, vers credentes x de hæret. C. 1, 2, 4, 2.

² C. 5, 9, 6, Boehmer de restrictâ de bonis suis in fav. secundi conj. dispon. fac.

³ C. 5, 9, 6.

⁴ Nov. 74, 5; Nov. 12, 1.

⁵ P. 28, 6, 45; Cod. Theo. de nat. lib. 1; C. 5, 27, 2 & 8; Nov. 89, 12.

⁶ P. 34, 9, 13.

⁷ P. 50, 17, 7.

⁸ P. 2, 14, 5.

⁹ Vinn. ad I. 2, 14, 6. 2, § 1.

§ 1241.

The inheritance is, as a general rule,¹ divided into twelve *uncia*² or parts; but the testator might divide it into fifth, seventh, or other fractional parts, and state that his heir should succede to $\frac{2}{3}$, B to $\frac{2}{3}$, &c. The whole heritage is called *As*, which, though it literally signifies a pound weight, which the Romans divided into twelve ounces, is in this sense intended to convey the idea of an *integer*:³ thus the *hæres universalis* was called *hæres ex asse*; one-twelfth being termed *uncia*; two-twelfths, *sex-tans*, $\frac{2}{12}$; the third, *triens*, $\frac{3}{12}$; the fourth, *quadrans*, $\frac{4}{12}$; the fifth part, *quinc-unx*, $\frac{5}{12}$; the half, *semis*, $\frac{6}{12}$; the seventh part, *sept-unx*, $\frac{7}{12}$; the eighth part, *bes*, $\frac{8}{12}$ ⁴ (the derivation of this word is unknown); the ninth part, *dodrans*, $\frac{9}{12}$ (demto uno quadrante); the tenth part, *dec-unx*, or *dextans*, $\frac{10}{12}$ (demto sextante); the eleventh part, *de-unx*, $\frac{11}{12}$ (de uncia). These fractions are further divided into *sem-uncia*, $\frac{1}{24}$, or half an ounce; *sex-uncia*, *duella*, or *binæ sextula*, $\frac{1}{12}$; the fourth part was termed *sicilicum*,⁵ $\frac{1}{4}$ oz. $\frac{1}{8}$; *assepondium*, one pound. *Dupondium*, or *dupondius*, is said of an heritage divided into twenty-four, and *tripondium* of that divided into thirty-six parts.⁶

The usual division into twelve parts or ounces.

§ 1242.

The estate must be so apportioned as to divide without a remainder; for if there be an unapportioned residue, the testator dies partly testate and partly intestate, which cannot be thus if the testator institute his brother, and two children of a deceased brother,—the brother will, by law, receive the half, and the children of the other brother the other half between them; but, in the above case of a will, the brother gets $\frac{1}{3}$, and the children $\frac{2}{3}$, for the Roman rule is *plure personæ in eadem propositione nominatæ pro unâ habentur*,—that is, as many parts are made as there are sentences; thus, if the testator write, *Caius hæres esto, Titius et Mævius pariter hæredes sunt, denique et Tullius, Aulus, ac Tryphonius hæredes sunt*, three equal divisions will be made,—one allotted to Caius, another to Titius and Mævius between them, and the third to Tullius, Aulus, and Tryphonius, among them. Again, if the testator leave to one his house, his garden to another, and his paddock to a third, these are considered as prelegacies, and the residue of money will be equally divided among, and the debts of the deceased equally charged to, the accounts of these heirs.

Rule followed in other divisions.

¹ I. 2, 14, 5.

² *ὀνγκια τῆν λίτρης*, J. Pollux, 9, 6, sig. 80. *Ἀλλὰ μίντοι παρ' αὐτῷ (Ἀριστοτέλει) τις ἂν ἐν τῇ ἡμετέριον πολιτείᾳ καὶ, ἄλλα ἔννοιαι Σικελικῶν νομισμάτων ὀνομαστα, οἷον ὀνγκίαν, ὅπερ δύναται οὐλεῖσθαι*.

³ *μονάδα quasi līc*, *As alīc*, derived from the Dorians, Sicilians, and Tarentines, which

two latter made it *āc*, whence the Roman *As*; Varro de L. L. 4, p 69. The Sicilians *λίτρα*, a pound; hence the Roman *libra*.

⁴ Brissonius de Verb. Signif. voce, *bes*.

⁵ P. 33, 1, 21, § 2.

⁶ Maianus dedius. hæred. in disput. juris. t. 2, n. 37; Thibaut, Pand. R. § 720.

If his portion be assigned to each, three cases may happen,—either the whole is divided, or is less, or more than the whole : —

A inherits	$\frac{8}{12}$	}	Each gets his share, the whole being apportioned.
B "	$\frac{1}{3}$		
C "	$\frac{1}{3}$		
Total	$\frac{12}{12} = \text{As.}$		

Or secondly, A inherits	$\frac{8}{12}$	}	Less than the whole is apportioned.
B "	$\frac{9}{12}$		
C "	$\frac{1}{12}$		
Total	$\frac{11}{12} = \text{As} - \frac{1}{12}.$		

Here the residue is divided in geometric proportion, *singulis pro ratâ accrescit* :—

The $\frac{1}{12}$ have a share in the surplus of $\frac{1}{12}$.

Or thirdly, A inherits	$\frac{8}{12}$	}	More than the whole is apportioned.
B "	$\frac{4}{12}$		
C "	$\frac{1}{12}$		
Total	$\frac{13}{12} = \text{As} + \frac{1}{12}.$		

Here each suffers a subtraction, *singulis pro ratâ decrescit* :—

The $\frac{1}{12}$ have to share in the deficit $\frac{1}{12}$.

§ 1243.

Inheritance,
how divided
when many
heirs are insti-
tuted in different
ways.

If many heirs are instituted in a different way, the following cases are to be distinguished :—the one is instituted *haeres in re certâ*, the others generally without assignment of proportions. (a) A is heir to my landed estate, B and C are my heirs ; or A is heir to my landed estate, B and C in equal proportions ; (b) or A is instituted heir *sine parte*, the others with fixed proportions, B $\frac{6}{12}$ and C $\frac{4}{12}$. In the first case, (a) A is instituted for a certain thing, and is therefore in respect to the others a mere legatee, and gets no more than that which is assigned to him, and is responsible for no portion of the debts of the estate ; but if the others be incapacitated from taking the inheritance, or repudiate it, A becomes a true heir, and receives the whole inheritance *jure accrescendi*.¹

Jus accrescendi.

In the other case (b) we distinguish, for instance, (1) when the portions do not exhaust the whole mass,—viz. A shall be my heir, B to $\frac{6}{12}$, C to $\frac{4}{12}$; here A gets the residue $\frac{2}{12}$; but if there be more than one, they get the residue conjointly *nec interest, primus*,

¹ Nov. 115, 3 ; Leyser, sp. 361, m. 9 ; Galvanus de usufr. c. 13, n. vi. ; Vinn. 2, 14, ad § 8, n. 1.

an medius, an novissimus sine parte hæres scriptus sit, ea enim pars data intelligitur quæ vacat;¹ neither does it matter whether A be named at the beginning, in the middle, or at the end. (2) If the portions of the mass be equal,—viz. A is my heir for 8 oz. ($\frac{8}{12}$), B for 4 oz. ($\frac{4}{12}$), and C shall be my heir; hereupon the law holds the testator intended to divide his property into a *dupondium*, or twenty-four parts, and meant by oz. $\frac{1}{24}$,² A and B get respectively $\frac{8}{24}$ and $\frac{4}{24}$, and C the rest;³ for Ulpian says,—*si asse expleto alium sine parte hæredem scripserit, in alium assem veniet*; the case would be otherwise, if it were A shall have $\frac{8}{12}$, B $\frac{4}{12}$, and C the rest, for then C would get nothing.

Lastly. (3) If the portions exceed the mass, A being heir to $\frac{8}{12}$, B to $\frac{6}{12}$, C shall be my heir, or inherit the rest; a *dupondium* would result—A would get $\frac{8}{24}$, B $\frac{6}{24}$, and C $\frac{10}{24}$. *Quod dupondio deest, habebit*;⁴ were a *dupondium* not sufficient, a *tripondium* would be made, *in trientem venit*.⁵ Justinian's concluding words, *in omnibus enim testatoris voluntatem, quæ legitima est, dominari censemus*, are easier spoken than to be acted on.

When the division of the dupondium and tripondium applied.

§ 1244.

The appointment of an heir representing the testator was an internal solemnity which made the essence of a Roman testament; the maxim being *si nemo subit omnis vis testamenti solvitur*,⁶ the heir is he *cui competit jus successionis in universitatem defuncti*; thus the heir succeeds to all rights and estates in being or in expectancy, therefore the words⁷ *Lucius mihi hæres esto* amount to a good testament, and the word *hæres*⁸ extends to heirs and heirs for ever.

Essentials of a testament. Institution or appointment of an heir, in whom the inheritance vests,

A sole heir succeeds alone to the whole; but if there be co-heirs to his proportion only, with the *jus accrescendi* or expectancy of the residue, if the others refuse it or be not able to take it; but if he have only a certain sum of money or thing, it has been seen that he is not an heir, but a legatee or trustee, *legatarius* or *fidei commissarius singularis*. The *hæres universalis* takes all the estate, without it being specially left to him; if there be no disposition to the contrary, or such dispositions have become invalid, the *singularis* takes but his share, as left.

with the *jus accrescendi*.

Hæres universalis.

Hæres singularis.

The heir succeeds to all the obligations of the deceased, which he must adopt as his own, *facta defuncti præstare*, and pay his debts. They are not merely personal rights and obligations which devolve on the heir, for there are *rights* which attach to the person,—as personal services, &c., offices which cannot pass, and *obligations* also, as punishments for crimes, guardianships, and partnerships.

The heir succeeds to all the rights of the testator.

¹ I. 2, 14, § 6.

² P. 28, 2, 13, pr.

³ P. 28, 5, 17, § 3.

⁴ I. 2, 14, § 8.

⁵ P. 28, 5, 17, § 3.

⁶ P. 50, 17, 181.

⁷ P. 28, 5, 1, § 3.

⁸ P. 50, 16, 70.

What is not a personal right as possession, does not pass before possession first obtained, except in so far as respects the right necessary for obtaining such possession.

Must be a Roman citizen.

Whoever aspires to these rights of a Roman citizen must be one himself, and have the *jus hæredis*, or, as it is otherwise expressed by Florentinus, *cum eo debet esse testamenti factio*.¹

§ 1245.

Capacity of heir may be temporal.

Cases may, however, happen where the heir may be capable at one time and not so at another, as in case of a body not incorporated till after its institution; in such case, the heir must be capable at the time the testament was made, *ut constiterit institutio*, for what is not valid from the beginning cannot become so subsequently, and at the time when the inheritance falls to him *tempore delatæ hæreditatis*, in order *ut effectum habeat institutio*; and hence the question as to when the estate vests; in considering which a distinction must be drawn between conditional and unconditional (*pure*) institutions,² in the latter case it vests on the death of the ancestor; but in case of the *conditionata*, again, two points are involved,—the condition may be fulfilled during the ancestor's life or after his death, the former case is the same as when the bequest was made *pure*, in the latter, the day of the decease does not enter into the question,³ but the condition is fulfilled *tempore existentis conditionis*.

Conditional institutions.

Incapacity between institution and dilation does not matter; otherwise between dilation and acquisition.

If the heir be capable of the inheritance at the moment the will is made and at the moment it vests, he can be heir, though he may have been incapable in the mean time,⁴ for *media tempora non nocent*;⁵ but he must remain capable from the time it vests till he realize it, and a moment's interruption will vitiate his inheritance, for at the moment of such interruption, the co-heirs or heirs-at-law obtain a vested interest, of which they cannot thereafter be deprived.

When one may inherit who cannot testate.

Although a party may not be capable of making a will, yet he may have the faculty of inheritance, still called *testamenti factio*, though somewhat anomalously. Thus a *furiosus*, *mutus*, *posthumus*, *infans*, *filius familias*, *servus alienus* are said to possess the *testamenti factio*; the extraneous heir has the same power of deliberating and abstaining.⁶

§ 1246.

Institution of an heir must be precise.

Precision is all that is required in the institution of an heir, as Ulpian⁷ says,—*si quis nomen hæredis non dixerit, sed indubitabili signo eum demonstraverit, quod pene nihil à nomine differt, non tamen eo, quod contumeliæ causa solet addi, valet institutio*; hence

¹ P. 28, 5, 49.

² P. 29, 5, 67; P. 28, 5, 46.

³ P. 28, 5, 44, 1.

⁴ P. 28, 5, 59, § 4.

⁵ P. 28, 5, 6, § 2, & 50, pr.

⁶ I. 2, 19, § 5.

⁷ P. 28, 5, 9, § 8.

the name is not material, but the description must not consist in an offensive nickname, "the head pimp of this town,"¹ or the like, vitiates the institution, because no one could assume the inheritance without declaring his own disgrace, which the law rightly repudiates; but my cousin, the bawd, might be good, for she need not apply as the bawd, but as the cousin. A false cause for institution will not vitiate it, for that resides in the testator's breast; but the institution must not be made dependent on the will of another, as A shall be my heir, if B will allow it: for Caius² says,—*satis constanter veteres decreverunt testamentorum jura per se firma esse debere non ex alieno arbitrio pendere*, the will is therefore void for uncertainty; the number of heirs also depends upon the testator, but that number must not be absurd, else the heirs-at-law step in; as, for instance, "I name all the inhabitants of the town my heirs," for this would be void for impossibility, although Justinian says,—*et unum hominem et plures ad infinitum, quodquis hæredes velit, facere licet*.³

Name not material. Injurious nicknames avoid the institution;

not so a false reason.

Otherwise if dependent on another's will.

The number of heirs instituted must not be absurd or impossible.

§ 1247.

Though the heir may not have been either disinherited or passed over,⁴ yet he may, after the death of the testator, be set aside as unworthy, though expressly instituted heir; or if there be no testament, he may be excluded from the intestate in succession, and the estate in that case is estreated to the exchequer.

Heirs may be set aside as unworthy.

Some of the causes of unworthiness to succede are,—when the heir through neglect have occasioned the testator's death, great enmity with the testator continuing till death, an attempt on the testator's honor and reputation, or for not prosecuting the authors of his death, &c.; for causes such as these, he shall, on proof, refund what he may have gotten into his possession.

§ 1248.

Certain persons cannot be instituted, on the ground that their institution was obnoxious to the law, thence termed *odiosa*, and cannot inherit from any one, *simpliciter institui non possunt*; others, on the other hand, are only prohibited from taking from certain testators in certain cases, or only a certain proportion of the property assigned, *secundum quid institui nequeunt*. As to the first case, the sons of traitors were incapable of all inheritance⁵ by the Julian law on lese majesty.

Persons incapacitated for institution:

traitors' children,

Filii vero ejus quibus vitam imperatoria speciali lenitate concedimus (paterno enim deberent perire supplicio, in quibus paterni, hoc est hæreditarii criminis exempla metuuntur) a materna vel avita omnium etiam proximorum hæreditate et successione babeantur alieni

¹ P. 28, §. 9, § 8; Wernher, sel. obs. for. 1, §, 235; Höpfner, § 488, n. 4; Westphal. de test. § 364.

² P. 28, §, 32.

³ Vid. Vinn. de hæred. inst.

⁴ P. 34 9, tt.; C. 6, 35, tt.

⁵ C. 9, 8, 5, § 1.

testamentis extraneorum nihil capiant, sint perpetuo egentes et pauperes, infamia eos paterna semper comitetur, ad nullos prorsus honores, ad nulla sacramenta perveniant; sint postremo tales, ut his, perpetua egestate sordentibus, sit et mors solatium et vita supplicium.

The next law denies pardon to those who dare to intercede for the above. The visiting the sins of the fathers upon the children appears to be taken from the Jewish polity, since no principle so contrary to justice or mercy can be found among the pagan Romans, and should so much the less be attributed to the true principles of Christianity which Arcadius and Honorius, who promulgated this law in the East and West, professed.

apostates,
heretics.

Secondly, Those who fell off from the Christian faith.

Thirdly, Heretics by the Canon law,¹ for Justinian himself² only refers to the Manichæans, of whom he was the avowed persecutor.

A Christian cannot institute a Jewish community, but a Jew can; nor collegia illicita; nor the prince to support a litigious title.

A Christian cannot, although a Jew can, institute an entire community of Jews; a Christian can, however, institute a single Jew.

Collegia illicita, or illegal assemblies or bodies not deriving their charter from due authority,³ cannot be instituted.

As to the second case, certain persons cannot in particular cases be instituted; thus the prince cannot be appointed heir for the purpose of sustaining a litigious title,—that is, when the testator fears his heir will have to sustain a suit, and names the prince with the malicious intention of his conducting it with the opposing party, whose interests would be prejudiced, and his chance of success diminished, and the suit prolonged by the influence and position of his opponent.

The law of
Pertinax.

This law is by *Pertinax*,⁴ and runs,—*eadem oratione expressit non admissurum se hæreditatem ejus, qui litis causâ principem reliquerit hæredem; neque tabulas non legitimi factas in quibus ipse ob eam causam hæres institutus erit probaturum; neque ex nudâ voce hæredis nomen admissurum neque ex ullâ scriptura cui juris auctoritas desit aliquid adepturum*,—that is to say, by an unsolemn written or nuncupative testament, or by an invalid written will; in addition to which, Paulus says, *imperatorem litis causâ institui ediosum est nec calumnia facultatem ex principali majestate capi oportet*. It is probable that this institution, *animo calumniandi*, was of very rare occurrence.⁵

Restrictions as
to a second wife.

One who has remarried, having children of the first marriage, not being permitted to leave his second wife more than he leaves the child, issue of the first marriage, to whom, if there be many, he has left the least,—the surplus left over such sum, allowed by

¹ X. 5, 7, 13.

² C. 1, 5, 4, § 2.

³ Vid. ante, § 870, h. op.

⁴ I. 2, 17, § 7.

⁵ Diss. de Princ. hæred. ex test. civ. in Exerc. Acad. Tom. 1, et Lud. Menken diss. de princ. litis causâ hæredi inst. in collect. disp. n. 24.

law, being divisible among the children of such former marriage; and this law applies equally to all sorts of inheritances, be they trusts, legacies, or heirships, gifts *inter vivos* or *mortis causa*. The object is clearly to prevent the stepmother injuring the children of the first marriage.¹

Every one but the parents themselves are permitted to institute children born out of wedlock, to whatever category they may belong,—*adulterini*, *incestuosi*, &c., which latter cannot be instituted by either father or mother² if they be issue of an incestuous marriage, although they can if of an incestuous *cohabitation*; ³ nor does it require remark, that the legitimate children must not be deprived of the portion allotted to them by law.

Children, issue of a *stuprum adulterium*, or *fornicatio*, may be instituted by the father and mother, with reservation of the legal portion to the legitimate children, this being nowhere prohibited.

Natural children, that is, those issue of a concubine, were capable of institution⁴ by the old law; but Constantine the Great appears to have ordained that the father should not leave them anything when he had children born in wedlock, legitimate children, parents, or brothers and sisters, or other agnate relations,⁵ probably for the discouragement of concubinage.⁶ Valentinian, Valens, and Gratian mitigated the rigor of this law, providing that when legitimate issue, grandchildren or parents were living, the *naturales* could receive $\frac{1}{2}$, but otherwise $\frac{1}{3}$,⁷ which Arcadius and Honorius confirmed as far as the $\frac{1}{3}$ went.⁸ In A. D. 428, Valentinian II. published a decree in the West, restoring the law of Constantinople, which was not, however, adopted by Arcadius in the East.⁹ Lastly, Justinian changed the $\frac{1}{3}$ into $\frac{1}{2}$, permitting the *naturales*¹⁰ to be instituted as to the whole in default of parents and legitimate issue; in the former case, however, the parents were entitled to their legal share.¹¹ Hence the mother may institute her natural children as if legitimate,—the father up to $\frac{1}{2}$, if he have legitimate issue, but otherwise without limitation, saving always the claim of the parents, should such be living, to their legal share.

The reason of natural children being placed in a more disadvantageous position than all other persons, is supposed to have

Natural children, when institutable, and by whom.

Vulgo quaeriti, when.

History of the changes in the laws respecting naturals,

under Valentinianus, Valens, and Gratian,

Arcadius and Honorius,

Justinianus.

The reasons of these laws.

¹ C. 5, 9, 6; Boehmer de restricta de bonis suis in favorem secundi conjugis dispenendi facultate in Elect. J. C. T. ii.

² At least not by the mother, C. 5, 9, 6; Tit. ad Lauterbach, obs. 856.

³ Nov. 89, 15, *omnis qui ex complexibus (non enim hoc vocatur nuptias) aut nefariis aut damnatis processit, iste neque naturalis nominatur, neque alendus est à parentibus neque habebit quoddam ad præsentem legem participium*. Here is no mention of an incestu-

ous marriage, still less of *adulterini*, vid. et Nov. 4, 5, & 12, 1.

⁴ P. 28, 6, 45; C. 6, 30, 13; P. 36, 1, 17, § 4; P. 31, 1, 88, § 12.

⁵ Gothofr. ad C. Th. 1, 394; Heinec.

ad L. I. et P. P. p. m. 174.

⁶ Vid. § 569, h. op.

⁷ C. The. de nat. lib. 1.

⁸ C. 5, 27, 2.

⁹ Goth. ad C. Th. l. c. 2.

¹⁰ C. 5, 27, 8.

¹¹ Nov. 89, 12; C. 5, 27; Auth. ad 8.

originated in the wish of the Christian emperors to discourage concubinage;¹ and it is also with the same view that they rendered marriage more easy. Other illegitimate children, *juris intellectu*, have no father, and, consequently, are in the position of strangers with respect to him; lastly, inasmuch as the natural children live in the house, they had a better opportunity than others of ingratiating themselves with the father, to the prejudice of the legitimate children.

The adulteress and adulterer could not reciprocally be instituted.

An adulteress could not be instituted heiress in the testament of the adulterer, nor *e converso*.²

§ 1249.

Sui hæredes, hæredes necessarii, voluntarii, extranei.
Necessary heirs.

Heirs are either *necessarii*, *sui et necessarii*, or *voluntarii*, otherwise called *extranei*.

Hæredes necessarii proprii pleno jure are the testator's own slaves in whom the testator had the *nuda proprietas*, and so termed, because he is forced to act in that capacity whether he will or no. Those whose debts exceeded their assets often adopted this method, that the disgrace of poverty might in some measure fall on the bondman, and that creditors might seize those goods which then appeared rather the heirs than the testators,³—in this case the slave was usually manumitted by will; but if not, still the freedom was clearly implied in the testament (though some lawyers thought it must be expressed), for the maxim obtains, who would arrive at a given result must adopt the necessary means, and the slave could not inherit if not free, but would only have acquired for the heir-at-law, on whom he would have himself devolved; neither would it have done to have freed him before death, as in that case he can repudiate the inheritance.⁴ Justinian changed this law, as he says, on a principle of equity, holding liberty to be always implied.⁵

The servus alienus.

The *servus alienus* is he in whom the testator has a usufruct⁶ only, a *nuda proprietas* being in another; but he cannot accept the heritage without his master's consent, for the heritage comes to him through the slave, consequently, he must be capable of accepting the inheritance, and be a Roman citizen.⁷

The servus communis.

A slave may be, as in the first case, the whole property of one person, *unius domini proprius*, or, common to many, *in solidum*; in the first case, he is said to be *pleno jure*, in the latter *nudâ tenus proprietate*.

The old law ruled, that if one master gave him his liberty or resigned his share, that share accrued to the remaining partners, and that the heritage followed the same rule if left to such slave,

¹ *Concubinitus* is not *damnatus coitus*, Höpfner, l. c. § 487, n. 5.

² P. 34, 9, 13.

³ Gaius, 2, 154.

⁴ I. 2, 14.

⁶ I. 2, 14, pr.; C. 6, 27, 5; Vinn. 2, 14, pr. 3; Ulp. 22, 16.

⁶ I. 2, 14, pr.

⁷ Vinn. 2, 14, pr. 3.

and vested in those who had an interest in him rateably as their shares. Justinian extended to all citizens a law, till then peculiar to military men,¹ by which, if one partner in a slave manumitted him, his co-proprietors could be obliged to accept the value of their respective interests, to be fixed by the prætor, and the slave thus gained his freedom; but in this case, the gift of freedom must be mentioned in the will, *hæres et liber*, otherwise the heritage will follow the rule of the *servus alienus* mentioned above, and accrue to the co-partners.²

The *servus hæreditarius* had the *testamenti factio*,³ and was interposed under the fiction that he represented the deceased, in order that the *hæreditas jacens* might be taken charge of, and vest in some one *ad interim*.

The *servus hæreditarius*.

§ 1250.

*Sui hæredes et necessarii*⁴ are children and grandchildren, as well as others who were in the *immediate* power of the testator at the time of his death, *proximi in familiâ*, they were otherwise called *hæredes domestici* and *necessarii*, because compellable, whether they will or no, to accept the inheritance under the fiction of their being *condomini*⁵ *ab intestato* by will and by the law of the Twelve Tables; the prætor, however, dispensed with their⁶ accepting the inheritance, in cases where the estate had been seized by creditors, —the term used in case of a *suus hæres* was *abstinere*, but with regard to others the harder term *repudiare*; the prætor, it must here be understood, in granting the *beneficium abstinendi*, did not dispense with his *suitas*, but only with the *necessitas*; and if he wish to claim this privilege he dare not have compromised himself, quoad the inheritance, in word or deed, or appropriated any portion of it, otherwise he loses his right to abstain.

Sui hæredes et necessarii.

Their rights and privileges.

The *beneficium abstinendi*.

All children, as soon as they quit the paternal power, cease to be *sui hæredes*, and a mother can have none such. In conclusion, it is worth remark, that the Roman lawyers never put the word *sui* after but always before the word *hæres* in this sense.

§ 1251.

Hæredes voluntarii were such as are neither the testator's slaves nor under his paternal power, otherwise called *extranei*,⁷ such naturally are in no way in the testator's power, consequently, they cannot be obliged to accept the heritage, but use their discretion, *adquirere* or *adire sensu generale*, or *omittere*, on the maxim that *hæredi ignorantibus vel invito hæreditas non acquiritur*.

Hæredes voluntarii.

Like other heirs these must, in order to accept the inheritance, be capable,—

¹ C. 7, 7, 1, pr. & § 1.

² Vinn. 2, 14, pr. 4.

³ I. 2, 14, § 2.

⁴ I. 2, 19, § 2.

⁵ G. L. Boehmer de suo hæredi dim.

⁶ I. 2, 19, § 2, ad fin.

⁷ I. 2, 19, § 5.

At the time the will is made in which they are instituted heirs ;
At the time of the testator's death ; and

At the time when he enters upon the inheritance. The status of the heir, during the intermediate periods, is of no consequence,¹ if under the age of twenty-five, he² may be testamentary or legal heir, he may administer for the heir, or become heir by assuming the inheritance which stands in the place of cretion.

§ 1252.

Peregrini could not be instituted, Foreigners, *peregrini*, could not be instituted heirs, because incapable of the rights of Roman citizens.³

nor cælebes, The Papien Poppæan law⁴ precluded bachelors *cælebes*, but this disability was afterwards removed by Constantine the Great.⁵
nor orbi. In the same category were *orbi*, or those whose marriage had been unfruitful, who were only permitted to take a tenth, not the whole;⁶ but if they had children by a former marriage, they were allowed as many tenths as they had brought up children.⁷

Strangers. Strangers in blood could only take a half by will.⁸

Universitates. As to *universitates*, there has been much discussion;⁹ certain it is, they could not *cernere hæreditatem*, and it would appear they cannot in fact be instituted heirs, although they may acquire an inheritance by bequest in trust, *fidei commissum*;¹⁰ and this was distinctly permitted by the *Senatus Consultum Apronianum*, made, as far as can be ascertained with any degree of probability, A. D. 117-123 under Hadrian, about which time *Fasti Consulares* mention one Apronius as holding the consulship.¹¹ The effect of this decree was to confer on municipalities the capacity of taking bequests by *fidei commissum*; before that time *municipia* and *municipes* were incapable of institution on account of their being *corpora incerta*, so that the whole, as members, were incompetent of the volition necessary, or of performing a *gestio pro hærede*.¹² Under Marcus, it would appear that the concession of this decree of the Senate to municipalities was extended to *collegia*;¹³ and another decree permitted municipalities to be instituted heirs by their freedmen,¹⁴—such were public slaves of the *universitatis*, being manumitted.¹⁵

Women. After the Voconian law women were excluded;¹⁶ but Dion Cassius¹⁷ tells us they were permitted to take *millia nummum*,¹⁸ *δύο ἡμισυ μυριάδας οὐσίας*, under which are to be understood

¹ I. 2, 19, § 4.

² I. 2, 19, § 6.

¹⁰ Ulp. l. c.

³ Cic. pro Cæc. 35.

¹¹ Cuj. ad Ulp. places it under Marcus ; Augustinus, de leg. et Scis.

⁴ Dio. Cass. 54, 16 ; Sozom. Hist. Eccl.

¹² § 725, h. op.

1, 9.

⁵ Soz. l. c. ; C. Th. de Infirm. pœn. cæleb.

¹³ Ant. Augustin. de Leg. et Scis. Schelling ad Ulp. Fr. 22, 5, p. 635.

⁶ Bach. de leg. Traj. p. 137.

¹⁴ P. 34, 5, 20.

⁷ Ulp. Fr. 13, 1.

¹⁵ Ulp. P. 38, 3, 1, § 1.

⁸ Hein. com. ad L. Jul. et P. P. 2, 21,

¹⁶ Grut. Inscr. p. 83, n. 13.

p. 343.

¹⁷ Cic. in Verr. 1, 43.

⁹ Contra, Plin. Ep. 5, 7 ; Ulp. Fr. 22, 5.

¹⁸ 56, 10.

drachmæ, which the Greeks always understood when speaking of Roman money;¹ hence it follows that this law restricted the inheritance of women to 25,000 drachms or 100,000 sesterces.²

Universitates termed ἀντρονόμοι, or those independent of the Roman state, who enjoyed their own laws, could be instituted;³ but later, universitates obtained this privilege,⁴ as well as that of receiving legacies.⁵

Universitates called ἀντρονόμοι.

The gods⁶ were also precluded from being instituted heirs,—in fact, lest the property so left them should only go to increase the luxury of the priests; this was, however, disguised by a civil reason, viz., because the gods *nec cernere nec adire hæreditatem poterunt*. The Roman emperors affected to make certain gods capable of inheritances, absurdly conferring upon them the *jus liberorum*⁷—among which were the Jupiter Tarpeius, Apollo Didymæus, Minerva Miliensis (Iliensis?) Hercules Gaditanus, Diana Ephesia, Mater Deorum Sipelensis (Sipylensis).

The gods could not be instituted.

§ 1253.

Uncertain persons may be instituted, if there be a possibility of solving the uncertainty whereupon the institution is good, which was not the case before Justinian's time,—indeed, the uncertainty often remedies itself, *tollitur eventu*; secondly, the *poor* can be instituted, and, if the testator have not defined them, he means such as live near his habitation; thirdly, *churches*; fourthly, municipalities; fifthly, all *corpora et collegia licita*, for all these are looked upon as *personæ incertæ*; lastly, *posthumi*, as coming under this head, were rendered capable of institution as heirs. Here some general observations on the law relating to the institution of posthumous children as heirs will not be out of place.

Personæ incertæ.
The maxim certum est quod certum reddi potest.

Churches.
Municipalities.
Collegia licita.
Posthumi.

§ 1254.

The jurists divided posthumous children (*posthumi*) into three kinds. The *suus posthumus* was he who, had he been born in the lifetime of his father, would have been a *suus hæres*; or,

The various descriptions of posthumi.

Quasi posthumus was one born during life, but *after* the execution of the testament; such child was also equally a *suus hæres*.⁸

Quasi posthumus.

Posthumus alienus is one not within these two categories; he could not be instituted by the Civil law, though the prætor would grant him the *bonorum possessionem secundum tabulas*.⁹ Subsequently Justinian directed, in a constitution which is now

Posthumus alienus.

¹ The usual interpretation of this passage is, that the Voconian law prohibited any one who has 100,000 H. S. to leave more than a quarter part, 25,000, to a woman. Bachovius ad Inst. 2, 14.

² Gronov. de pec. vet. 3, 16; Perozon de L. Voc.; A. Gell. N. A. 20, 1.

³ Tac. A. 4, 43. Vulcatius Moschus, when exiled, left his property to the Mas-

sienses, who were per Strab. Geo. 4, 1, § 5; Grot. de J. Bat. P. 1, 3, 12.

⁴ C. 6, 24, 12.

⁵ Paul. P. 30, 1, 122, pr.

⁶ Ulp. Fr. 25, 6; Schult. Jur. Antejust. p. 603; Falca Semest. 3, 1.

⁷ Dio. Cass. 55, 2; for authorities vid. Heinec. A. R. 2, 14, § 4.

⁸ Vid. Frag.

⁹ P. 5, 2, 6; P. 37, 9, 1, 12; P. 37, 11, 3.

lost, entitled *de personis incertis*, that all posthumi should be instituted.¹

Agnatio sui
hæredis vitiates
the grandfather's
will.

The birth of a posthumous child, after the father's death, is called *agnatio sui hæredis*, and vitiates the parent's will; in like manner, the *quasi agnatio sui hæredis*, or birth of a grandson after the grandfather's death, who would succede into the place of his father.

§ 1255.

Posthumi,
Aquiliani, Velleiani, Juliani,
Corneliani.
The Aquiliani.

Posthumi are also denominated *Aquiliani*, *Velleiani*, *Juliani*, and *Corneliani*: The first, after the famous lawyer Aquilius Gallus, who first pointed out to the grandfather the means by which he could prevent a grandson, born after his own and the father's death, from voiding his, the grandfather's will, viz. by instituting him according to the following formula:—

*Filius meus hæres esto. Si filius meus me vivo morietur, tunc si quis mihi ex eo nepos sive quæ neptis post mortem meam in decem mensibus proximis quibus filius meus moreretur, natus erit, hæredes sunt.*² The commentaries which have been written on this passage are without end.

§ 1256.

Velleiani.

The *Velleiani* derive their name from the *Lex Jania Velleia*, by which grandchildren born in lifetime of the testator, he being the grandfather, and before the making of his will, but after the father's death, and after the execution of his testament, *posthumi in sensu juris* (*quasi posthumi*), are bound by the will in which they are named heirs or disinherited. Gaius³ says, — *Posthumorum duo genera sunt quia posthumi adpelluntur ii, qui post patris mortem de uxore nati fuerint, et illi, qui post testamentum factum nascuntur.*⁴

§ 1257.

The Juliani.

Juliani are grandchildren born after the execution of the grandfather's will, but in their father's lifetime, who, upon the death of the father, succede into his place.⁵

§ 1258.

The Corneliani.

The *Corneliani*, so called from the *Lex Cornelia testamentaria*, are children of a Roman citizen born during captivity in war.⁶ This premises that, according to the old law, no *posthumus* could be testamentary heir (which Allartucius, however, denies⁷), although he could succede *ab intestato*, upon the assumption of his being a *persona incerta*.⁸

Hence every *posthumus suus*, whether instituted, disinherited, or passed over, vitiates the will.

¹ Vinn. ad I. 2, 13, 2, & I. 2, 20, 26, 27 & 28; Sap. Gentilis tract. de erroribus test. 2.

² P. 28, 2, 29.

⁴ P. 28, 3, 3, § 1.

³ Gaius, 2, 3, 2.

⁵ P. 28, 2, 29, § 15.

⁶ P. 28, 3, 15; P. 49, 15, 22, § 4.

⁷ Var. Expl. Jur. lib. 1, L. 26.

⁸ Finestres ad Lit. de lib. et post, p. 188, &c.

§ 1259.

Heirs may be instituted unconditionally, called *pure*, or conditionally, but not for or from a fixed time, in *diem certum* or *ex die certo*. *Diem adjectum haberi pro supervacuo placet*, says Justinian,¹—and Papinian,² *vitio temporis sublato manet institutio*; as, for instance, “A shall be my heir for ten years,” or “A shall enter as my heir ten years after my decease.” The reasons of this are twofold,—first, that if the *institutio in diem* were allowed, the testator would die testate for ten years, and be intestate afterwards, or be intestate for ten years and intestate afterwards; but, again, none can be an heir and then cease to be so,³ therefore these institutions are bad; and the same reasons hold in institutions *ex die*, for the intestate heir must then enter, and afterwards cede to the testamentary heir.

Conditional institutions, when valid, and when void.

In respect of time.

But could the object be obtained by a *fidei commissum*, a system introduced to effect such like ends? It would appear not, for the Roman legislators held that an heir shackled with a trust was still the heir, even after he had surrendered his trust, for the heir in trust was *hæredis loco*.

The day may be *totally* uncertain, that one may not know *if* it will come or *when*, viz., “A shall be my heir when he initiates his first child”; or,

Total uncertainty of time.

It may be uncertain only *if* it may come, viz., “A shall be my heir if he shall attain the age of 50”; or,

Uncertain if.

It may be uncertain only *when* it may come, viz., “A shall be my heir when the treaty now under negotiation shall be signed.”

Uncertain when.

All these are uncertain conditions; but “A shall be my heir the day I die,” is considered to be no condition, and in consequence not to vitiate the institution,⁴ for the testament takes effect on the testator’s death.

§ 1260.

An heir may also be instituted *sub causâ*, as,—“I appoint A heir because he has rendered me important services”; or *sub modo*, as,—“I institute A that he may study.”

Institutio sub causâ et sub modo.

A condition is, in the general acceptance, an external right to which a certain right is attached. A condition is said *pendere* so long as its fulfilment is doubtful, *existere* when the circumstance on which it relies happens, and *deficere* when it is clear that this latter will not be the case, as in case of marriage and male heirs.

Conditions are in suspension, in existence, or in default.

Conditions are subjected to yet further conditions, as to time *in præsens*, *in præteritum*, *vel in futurum collatæ*,—I name A my

Conditions present, past, and future.

¹ I. 2, 14, 9.

² P. 28, 5, 34.

³ P. 28, 5, 88.

⁴ C. 6, 24, 9; P. 35, 2, 79, pr.

heir if he shall have been received an advocate before I shall have made this my will.

§ 1261.

Conditio
difficilis.

There is a difference in operation between things impossible or merely difficult. Things may be utterly, or only under certain circumstances, physically impossible,—the former are *absolute*, the latter *de facto per accidens ex suppositione impossibiles*, also *falsæ*; ¹ if one or the other person may be able to fill them, but many be not, they are then called *difficiles*, ² of which examples are given in the Pandects.

§ 1262.

Conditiones
casuales,
protæstatiæ,
or mixtæ.
Casual.

The possible condition is either *casualis*, *protæstatiua*, or *mixta*. *Casualis*, when external circumstances not within the control of him whose right depends on the condition, must concur to its fulfilment, as,—“A shall be my heir, if peace be concluded this year.”

Protæstative or
promiscuous.

Paulus³ calls the *protæstatiua promiscua*, when the will of the party is necessary to the fulfilment, as,—“B shall be my heir on condition of his assuming my name.”⁴

Mixt.

Mixta, when the two above conditions are combined,—“A shall be my heir if he beget a son.” Here the condition may be barred if uncontrollable external circumstances do not actively favour A, and if A do not choose to marry,⁵ is an instance of the first; “A is my heir if my son be dead,” is an example of the second; and, “A is my heir if he shall be married,” explains the third.

§ 1263.

Condition affir-
mative;

negative,

resolutive,
suspensive.

A condition may be *affirmativa* or *negativa*. The condition is *affirmativa* when the right depends upon something being done, as,—“A shall be my heir if he become an advocate”; or *negativa*, when it depends on something being omitted to be done, as,—“A shall be my heir, if he do not enter the church.” The condition may also be *resolutive*, or *suspensiva*; in the latter case, the right of inheritance ceases with the extinction of the condition,⁶—in the former case, it commences on the condition coming into existence.

§ 1264.

Conditions pos-
sible and impos-
sible.

The condition may be *possible* or *impossible*, and this latter physically, or morally the former; as, for instance, “A shall be my heir if he draw a triangle whose three angles shall not amount to 180 degrees,”—or morally, “A shall be my heir if he well drub

¹ P. 35, 1, 72, § 7; P. 28, 7, 6.

² P. 35, 1, 27 & 71, § 2 & 83; P. 36, 1, 63, § 7; P. 40, 7, 4, 1.

³ P. 35, 1, 11, § 1.

⁴ P. 36, 1, 63, § 10.

⁵ C. 6, 51, 1, § 7; P. 35, 1, 83.

⁶ I. 3, 24, § 2, 3.

B, who has grossly insulted me," for such condition is illegal, therefore morally impossible.

§ 1265.

The rules of conditions are generally as follow :—

A *conditio in præsens*, or *præteritum collata*, does not defer the acquirement of the right, but merely holds it in uncertainty ; for, on opening the will, it is seen that the condition has existed, or do exist.¹

General rule applicable to conditions.

An heir cannot be instituted *sub conditione resolutivâ*, for once heir alone heir.

Conditio resolutiva ;

A *physically impossible negative* condition is as good as none, or as an unconditional one,² and is no bar ; but a *morally impossible negative* condition is operative, for the heir must enter into recognisances not to do the illegal act in order to inherit, such condition therefore vitiates the appointment unless security be given.

negativa.

A generally impossible affirmative condition, be it morally or physically impossible, is looked upon as conditional, and is inoperative, *pro non adjecta habetur, evanescit, detrahatur, conditio*, that is, the heir takes the inheritance despite the condition ; in this case, the testator is punished by the condition not being taken account of.³

General impossible affirmative condition.

When the condition is possibly impossible, the questions arise of whether the testator were aware thereof or not,—if the heir can fulfil it, the same rule applies as to possible conditions,—but if he cannot, the question arises as to the *animus* of the testator. If he were conscious of the impossibility of the condition, it is considered as non existent ; but if he were not aware thereof, it is valid, and the heir succeeds to the estate.⁴

Possibly impossible conditions.

In possible conditions, three periods are to be observed as regard respectively the *pendens*, *existens*, and *deficiens* ; for if the condition be *pendens* and *casualis*, or *mixta*, the heir cannot enter on possession, though the prætor will grant him, *bonorum possessio secundum tabulas*,⁵ but he is bound to give caution to surrender the estate in case the contrary of the condition happen.

Possible conditions.

If the condition be *potestiva affirmativa*, and the heir can fulfil it, he must do so immediately on the testator's death ; but if this be impossible, he must obtain the *bonorum possessionem secundum tabulas* and give security for subsequent performance,—as, for instance, if it were that he should marry, and was too young.

Conditio potestiva affirmativa.

§ 1266.

In the case of negative conditions, the heir can enter upon the estate on giving the Mucian caution ; for if it were that he should

Cautio Muciana.

¹ P. 28, 7, 10.

² Tomer rer. quotid. lib. 6, c. 29 ; in Otton. Thesaur. Tom. 2, p. 311.

³ P. 40, 4, 61 ; Paul. recep. sent. 3, 6, 4 ; Ulp. Frag. 24, 15 ; P. 30, 1, 12, § 1 (2) ; P. 35, 1, 79, § 1 ; P. 28, 3, 16 ;

Theoph. P. 28, 3, 10 ; P. 44, 7, 31 ; Voet. com. ad P. 28, 7, 16 ; P. 40, 7, 4, § 1 ; P. 50, 17, 135 ; P. 40, 7, 3.

⁴ Gundling diss. de principe hæred. F.C. 6, § 30.

⁵ P. 37, 11, 6.

not become a soldier for instance, according to the old laws, he never could have inherited, for it would always be possible that he would infringe the condition. Q. Mucius Scævola Pontifex Maximus introduced a clause to the effect that, in giving caution, he promised never to transgress the testator's will, hence called Mucian;¹ Ulpian says² expressly, *Mucianæ cautionis utilitas consistit in conditionibus quæ in non faciendo sunt conceptæ*.

Condition, in what cases it applies;

This caution can then be applied to positive negative conditions, to-wit, in cases when nothing can be considered as fully complete before the death of the heir or legatee, *quæ non nisi morte eorum, quibus aliquid relinquitur, finiuntur*. Papinian³ gives the following example:—A testatrix says, "I give this sum to my daughter-in-law, under the condition that she do not separate from her husband." Here the Mucian caution does not apply, for the husband may die first, and it is certain she will not separate from him; again, it is of none effect if the condition be limited to time, as, "that one should not be a soldier before his twenty-fifth year," *quia hæc conditio ante mortem legatarii finiiri potest*.⁴

at what time it takes effect.

If the condition exist, which may sometimes be fairly admitted in doubtful cases,⁵ the heir obtains the estate, not from the day on which the condition became operative, but from the death of the testator,⁶ *retro pura censetur institutio*; the heir must, however, live to see the fulfilment of the condition; for if he die before, his heirs get nothing, *institutio sit caduca*.

The same would occur if the fulfilment of the condition disappears, as, "B is my heir if he free Davus," and the slave dies before manumission. The will is void, and the heir loses all hope of his inheritance, *testator intelligitur a principio intestatus decessisse*.⁷

§ 1267.

Acceptance of the heir.

If the heir be found willing, capable, and worthy, he continues heir by express declaration and acceptance; or, tacitly, when by any act⁸ he intermeddles with the estate, and behave himself as heir.⁹

Aditio et gestio pro hærede.

The declaration of acceptance in the first case is called *aditio*, but in the second *gestio pro hærede*,¹⁰ a term construed very largely; thus, any positive act, such as entering upon a property, making arrangements with creditors,¹¹ or the like, will be so interpreted, but the act must not admit of a double interpretation, as burying another which may be out of natural affection; a declaration may

¹ P. 35, 1, 7, § 3; P. 36, 1, 65, § 1; P. 35, 1, 73-77, § 1-79, § 2 & 3; P. 35, 1, 101, § 3.

² P. 35, 1, 7.

³ P. 35, 1, 3.

⁴ P. 35, 1, 67; P. 28, 7, 4 & 6, & 15, & 28; C. 6, 25, 4; C. 6, 28, 4.

⁵ P. 34, 5, 10, § 1.

⁶ P. 29, 2, 54.

⁷ P. 35, 1, 31; P. 30, 1, 54, § 2 (1); P. 28, 7, 23. There is a conflict in the laws of the Digest on this question.

⁸ I. 2, 19, § 7.

⁹ C. 6, 30, 22, § 13 & 14.

¹⁰ P. 11, 7, 14, § 8.

¹¹ Ulp. Fr. 22, 26; Paul. R. S. 4, 6; Voet. ad 28, 2, § 5.

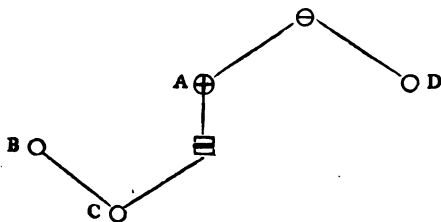
also accompany any act that is not done *animo hæredis*, which secures the party.¹

§ 1268.

So long as an heritage be not entered upon, it is said to be *jacere*. Hæreditas jacens. Ulpian² says, *personam defuncti sustinet*, and the law feigns the deceased to be still alive and in possession, which confers a sort of personalty on the inheritance, as Caius expresses it, *hæreditas domina est*; and if so, must be placed among the legal personages, which it has been seen it cannot be.³

A guardian cannot assume an heritage without his pupil's knowledge,⁴ nor can this latter do so *sine auctoritate tutoris*; but if he be a child, the legal fiction comes into operation, *pupillus pro bærede se gerere videtur auctore tutore*.⁵ Gestio pro bærede. Theodosius the younger,⁶ however, permitted the tutor to accept in the name of his pupil; but neither a father nor master can accept for the son or slave, for these must themselves do so at the command of the father or master.⁷

The father could, however, pray a *bonorum possessionem* in his son's name,⁸ until Theodosius permitted the father to enter for the son.⁹ Justinian went further, and permitted the son to accept without the father's consent if *secundâ ætate*, viz., a minor beyond the years of puberty, considering it as a *peculium adventitium extraordinarium*.¹⁰ The curator may obtain the *bonorum possessionem* for an idiot ward for the sake of alimony, but not for a prodigal or madman,¹¹ who must administer by their curators,¹² and this *bonorum possessio* vests if the mad or idiot heir come to his senses. A dies, leaving an idiot grandson. Here C's father obtains the administration for him, C dies an idiot, and D, the grandfather's brother, succeeds, for he would have succeeded if C had not been born.¹³



§ 1269.

The acceptance must be voluntary, otherwise it is nugatory, and must be for all or none; and every declaration of acceptance is an entry which cannot, according to Paulus, be performed by attorney,¹⁴ *per procuratorem hæreditas adquiri non potest*, or, as

Acceptance must be voluntary,

¹ P. 41, 1, 34; I. 2, 14, § 2; P. 30, 1, 116, § 3.

² P. 28, 5, 31; P. 46, 2, 24; Vinn. ad 2, 14, 2, n. 1; Finestres, l. c. § 14; sed vid. § 358, h. op.

³ § 879, h. op. in fin.

⁴ C. 6, 30, 5.

⁵ P. 36, 1, 65, § 3; vid. § 358, h. op.

⁶ C. 6, 30, 18, § 2.

⁷ P. 29, 4, 1, 2; P. 26, 41, 2, & 36, § 1.

⁸ P. 37, 3, 1.

⁹ I. 2, 19.

¹⁰ C. 6, 6, 8, § 3.

¹¹ Reinold varior, c. 1.

¹² C. 5, 70, 7.

¹³ C. 6, 61, 8; C. 27, 10, 7, § 2; Boehmer, intr. in jus Dig. est 29, 2, 10.

¹⁴ P. 41, 2, 90, et vide § 358, prope fin.; § 895-6, h. op.

Modestinus says, *homo liber hæreditatem nobis adquirere non potest*.¹ It is, however, doubted.

and cannot be conditional.

Acceptance cannot be *conditional*, as,—“should the estate be solvent” (*solvendo*). The reason thereof would appear to be, that the declaration must be certain and positive,² for it would be otherwise prejudicial to creditors and legatees, for the time might be deferred indefinitely; besides, A might be heir to-day, and B to-morrow, if the condition were resolute, which is against the legal maxim—“once heir ever heir.”

§ 1270.

Transmissio hereditatis.

It is a rule, that *hæreditas nondum adita non transmittitur*. The logical reasons for this rule are the failure of necessary acceptance on part of the heir, the fact of the right of inheritance being a *jus personalissimum*. To this there are four exceptions :—*ex jure suitatis*, by the identity of the person of the heir with that of the testator; *Theodosiana*,³ by which emancipated children, who must *adire hæreditatem* by some outward act, are allowed, if they die before such act, to transmit the right of inheritance to their descendents, but to none other. The *Justiniana*⁴ permits the heirs of an heir, who dies during the period of deliberation, to declare the acceptance within the unexpired term; in which case, the inheritance is held to have been accepted by the deceased.

Restitutio in integrum granted when the next heir dies abroad.

Transmissio ex capite restitutionis in integrum. This is applicable when the next heir dies abroad on public duty, *causa reipublicæ*,—the next heirs can pray the above order, and thus obtain the inheritance.⁵

§ 1271.

Obligations of the heir on administration.

An heir has to acquit all the debts of the deceased, fulfil all obligations, and assume all rights of the deceased, for he becomes one and the same person with him. If he be the universal heir, he must alone pay all the debts,—thus the Germans have a proverb, “wer ein Heller erbt, muss einen Thaler bezahlen,” “inherit a farthing and pay a crown”; but if he be co-heir, the debts are divided *pro ratâ* as the shares, his obligations are considered *quasi ex contractu*, hence the claimants can bring an *actio personalis ex testamento* against him.

The heir cannot repudiate after acceptance; but an exception is made in favour of infants, because, if he be an infant and a minor, he can pray a *restitutio in integrum*.

Repudiatio hæreditatis. Omissio.

When an heir declares that he will not accept the inheritance, he is said *repudiare hæreditatem*, which may be by word or deed. In the former case it is properly called *repudiare*,—in the latter, *omittere*; of which, first buying or hiring a parcel of land from the

¹ P. 41, 1, 54.

² Jac. Gothfr. ad L. 76 & 77, de R. I. opusc. p. 934, 941.

³ C. 6, 30, 18; F. A. Niemeyer de

trans. Theod. ad Const. un Cod. 6, 52, de his qui ante assert. tab. Hæres, 812.

⁴ Sed. preceding paragraph.

⁵ P. 41, 2, 30.

heir appointed on the part of the disinherited or passed over party, paying the debts he owed the deceased to the heir, or demanding of him what is due, are instances. No heir can repudiate before the estate come to him, as by declaring in the testator's lifetime that he would not accept the inheritance,¹ or declaring that if instituted under a certain condition he will not accept, or during the preparation of the inventory or deliberation of the nearer heir all such² declarations are void, and he may nevertheless assume the heritage. Simple silence does not amount to an omission: no right on the inheritance accrues to whomsoever may be in possession before the expiry of thirty years.³ The act which will constitute a *gestio pro hærede*, is also necessary to bar an *omissio*.

Repudiation cannot be anticipated.

If the heir have once repudiated, he is for ever barred, except he be an infant or a minor; in which case, he has his remedy by *restitutio in integrum*.⁴

§ 1272.

In order, however, to place the heir in security, the prætor granted him a period for deliberation, as to whether he would accept or repudiate the inheritance, which Justinian⁵ superseded by the *beneficium inventarii*, between which two modes⁶ the heir was bound to elect.

Tempus deliberandi,

The *jus deliberandi* was introduced that the heir should not be compelled to pay *ultra vires hæreditatis*, but be enabled to throw it up as if it were a bankrupt estate.

If no one presses the heir, either as substituted heir, remainder man (heir in tail), or creditor, he has the term of thirty years to deliberate; but if he let this pass, prescription steps in, and the estate is lost if another has possessed it as his own in the mean time, otherwise prescription is no bar; but if the heir be pressed by a presumptive or intestate heir, or a creditor, he must decide within a year, which is reckoned from the time the heir was aware of the fact of his succession; at the expiry of this term, he may pray from the prince or proper authority a further term not exceeding one hundred days; the prince can only give a year, and the court only nine⁷ months, on sufficient reasons being assigned.

extends to thirty years in certain cases.

From what period it dated.

If the heir do not declare his determination within the first or second term, the estate falls in to the presumptive heir or creditor; if the latter, he can demand that the heir enter—though Thibaut, on examination of the old laws, is of another opinion—or that the entry be taken as made;⁸ but if the heir die during the period without declaration, his heirs may declare within the unexpired part of the period.⁹

When the estate lapses to the next claimant.

¹ P. 29, 2, 94.

² P. 29, 2, 17, § 1; Id. 70 & 77.

³ Leyser *op.* 272, med. 1.

⁴ P. 4, 4, 24, § 2; C. 2, 40, 1, § 2.

⁵ Vinn. 2, 19, ad § 5, n. 1, c. 3.

⁶ C. 6, 30, 19.

⁷ P. 28, 8, 1, § 2; C. 6, 30, 22.

⁸ Thibaut, *Theor. d. R.* 2, 7.

⁹ C. 6, 30, 19.

The extension
of the term of
deliberation.

It may be then assumed on the authority of many lawyers that the term to which the heir has a right without petition is a year, but the time to be prayed is either twelve or nine months, every heir may deliberate a year; if this be insufficient, he prays a second *spatium deliberandi*, this agrees with the codex,¹ and we may assume with Voet.² that the law of the Pandects falls to the ground.³

These prefatory remarks will have rendered the *transmissio Justiniana* more clear, which is, that if the heir die within the legal time or that prayed for, he transfers to his heirs the right of declaration during the residue of the period.

§ 1273.

Beneficium
inventarii.

It was doubtless a useful and reasonable permission, that an heir should not be compelled to accept a *damnosa hæreditas*; but the means by which this end was supposed to be effected were far from sufficient, for a creditor might come in when the heir thought the estate perfectly solvent, and render him liable *ultra vires hæreditatis*; ⁴ it was to obviate this inconvenience that Justinian introduced the *beneficium inventarii*,⁵ or the privilege of causing an inventory of effects to be made under the sanction of public authority, beyond the amount of which no heir was obliged to pay claims upon the deceased; by these means the beneficial heir was secured from risk. The deliberation in its original sense, therefore, became unnecessary.⁶

Inventory when
to be made, and
how.

It was requisite (1) that such legal inventory should be begun within thirty days, reckoned from the moment at which the heir had learned that the inheritance had accrued to him; (2) that it should be finished within sixty days if no obstacle presented itself, otherwise within a year; (3) that *tabularii*⁷ should be employed, otherwise called *conditionales*,—these were public officers corresponding to notaries, whose business it was to draw up public documents,⁸ or in want of such three witnesses; (4) that the legatees and trustees be invited to be present; and (5) that the heir subscribe the inventory so made if he can write, but if a marksman, by the *tabularius*, adding *venerabile signum crucis*.⁹

Continental
practice.

This is now done otherwise on the continent,—the authority or a notary seals up the property of the deceased, makes an inventory, enumerating all the property of the deceased, without calling in the legatees or trustees; in Saxony, this is superseded by a *jurata specificatio*, by a private hand.

¹ C. 6, 30, 22, 13.

² Voet. ad Pan. de jur. delib. 2.

³ P. 28, 8, 1, § 2; Id. 2, 3, & 4.

⁴ C. 6, 30, 22, 4.

⁵ C. 6, 30, 22, 2.

⁶ I. 2, 19, 6.

⁷ Nov. 1, 2.

• Briesonius ad voc. Tabularius Carl Fred. Walch de inven. hæred. form leg. Hamburg. præscrip. § 7, n. a.

⁹ Milosch Obrainovitch, the Gospodar of Servia, signed his abdication by proxy, with this paragraph, *non sapendo scrivere fo il cenno venerabile della croce*.

§ 1274.

We now come to the origin of the *jus accrescendi*, or right of survivorship, the history of which is shortly as follows :—Before Augustus, it applied equally to heirs who took under a testament, and to those who succeeded as heirs-at-law ; the *Lex Julia et Papia Poppæa*, however, enacted *si hæres pro parte, legatariusve quibus pure vel in certum diem hæreditas legatumve relictum erit*, post mortem testatoris ante apertas tabulas testamenti *decidet vel pereger fiet*¹ *ea hæreditatis pars caduca sunt populoque deferuntur* ; and in another place, *si hæres legatariusve post mortem testatoris ante eventum conditionis deficiat, hæreditas legatumve caduca sunt populoque deferuntur* ; lastly, *si quicumque hominum, hæres, legatariusve vivo testatore post testamentum conditum decidat conditione deficiat relictum in causa caduci esto et populo quasi caducum deferatur*. The *Scutum*. Trebellianum abrogated the last paragraph, and Justinian all three, so that the *jus accrescendi* was restored to the position in which it had been before Justinian.²

Jus accrescendi, or right of survivorship.

This *jus accrescendi* or right of survivorship must occasionally occur where there are co-heirs, one of whom will not take, or becomes otherwise incapable of taking his share, such share then accrues to the other co-heirs, *accrescit reliquis*,³ such accretion being purely an accidental circumstance equally incidental to inheritances under will or *ab intestato*.

In the case of co-heirs.

If some of the co-heirs are especially nominated heirs in a sentence, *co-hæredes conjuncti* or *collegæ*, and one of them fail, he who is conjoined with him excludes the other *disjuncti* ;⁴ for instance, A is my heir, also B and C,—if, then, B fail, C acquires the portion so vacant. This *jus accrescendi* accrues when the one heir dies before the testator, before the fulfilment of the condition, when the condition is not fulfilled, or when he turns out to be incapable of inheritance.

When named in one sentence.

The heir can neither demand nor prevent its operation except in the case of a military will,⁵ when it is necessary to show that it was the testator's intention, for a soldier can die partly testate and partly intestate, which a *paganus* cannot ; another exception is that of a minor who prays *restitutio in integrum*, before entering upon the heritage, in which case a co-heir cannot be compelled to accept the vacant portion, *sed bonorum possessio creditoribus datur* ;⁶ but in ordinary cases the co-heirs cannot repudiate this portion, either they must forfeit the whole or take their share with the accretion ; hence it is not necessary even that they know the fact of a co-heir having gone off, for the heir or co-heirs being the successors to all that the deceased had, if any portion remain

Soldiers and minors excepted.

Co-heirs cannot repudiate it.

¹ Lost his citizenship.

² C. 6, 51, 1 ; Höpfner, l. c. § 492,

n. 4.

³ C. 6, 50, 1, 10 ; 28, 5, 63.

⁴ C. 6, 51, 1, § 10 ; P. 28, 5, 63.

⁵ P. 29, 1, 37.

⁶ P. 29, 2, 61.

unappropriated, the deceased would have died partly testate and partly intestate.¹

§ 1275.

The origin of substitutions to prevent the testamentum becoming destitute, and to preserve sacred rites. Grounds of each reason.

The practice of substituting one heir for another is referable to a double origin,—first, to the fear a Roman had of his testament becoming destitute of an heir; and, secondly, perhaps to the anxiety manifested of preserving the *sacra privata*. The former reason is however the better, inasmuch as, on a testament becoming *destitutum*, the inheritance would by law devolve on the *proximus agnatus*, whereby the object of preserving the family sacred rites would have been fully answered, except indeed the agnati all abstained. It may therefore be assumed that the real object of the Roman testator was rather to retain the power of regulating the ultimate destination of his property, according to his will, as far as practicable. This is effected by instituting a series of conditional heirs, reversioners, or remainder men, for it is possible that the heirs-at-law failing, the heir instituted may abstain from the inheritance, if it should be suspected of being *damnosa*, and so it would in fact become an *hæreditas jacens*, or *vacua*, and lapse to the exchequer, in which case certainly the *sacra privata* would become extinct in that line. This became of less importance when the practice of inventories was introduced, together with the principle of the heir not being bound to pay debts beyond the assets, because then the heir could have no reason for repudiating or abstaining from the inheritance; nevertheless, the chance of death, before the inheritance had vested so as to pass by the law of intestacy, remained, and substitution could not in consequence be dispensed with,—such substituted heirs were termed *hæredes secundi*,² *tertii*, &c. Appian³ mentions this practice as being Roman. Ἔθος Ῥωμαίοις παραγράφειν τοῖς κληρονόμοις ἑτέροις, εἰ μὴ κληρονομοῦν οἱ πρότεροι. We have the record of a substitution by Augustus, who instituted Tiberius and Livia, and substituted as second heirs the grand and great grandchildren, and in the third place the chiefs of the State.⁴

Case of substitution by Augustus.

Entails in England.

Entails in England form an exact parallel with substitutions, an heir in tail being an heir appointed by the testator to succede, failing the former, but it does not extend beyond one generation unborn.

§ 1276.

Substitutio successiva.

If the heirs be instituted successively, the one failing his predecessor as after or heir in remainder, a direct substitution, properly so called, is created; but if all be instituted together,

¹ C. 6, 51, 1.

³ De Bell. Civil. 2, 143.

² Cic. de Juv. 2, 21, pro Cluent. 11; Remæsti Inscr. Class. 8, p. 815, n. 13, 14, et Grut. Inscr. 518, n. 7, et 569, n. 7.

⁴ Fac. A. 1, 8; Suet. Aug. 101; vide et Suet. Claud. 6.

all are direct heirs,—in other words, *cohæredes*, co or joint heirs; but if one be instituted for his life with a condition that at his death another should succede, the *substitutio* is *fidei commissaria*; and in fact no substitution at all, for the first heir only has a life interest, and holds the estate as a trustee in fact for the remainder man.

Substitutio is then the institution of a second heir in case the first fail, a third for the second, and fourth for a third, and so on. *Secundum hæredem scribere* simply means to substitute,¹—hence substituted heirs are termed *hæredes gradu secundo tertio*, &c.

Substitution may have reference either to the person or to the case in which the substitution should take place. Firstly, it is military, or it is not so—which will be discussed in its proper place; secondly, in respect to the case, it may be *vulgaris*, *pupillaris*, or *quasi pupillaris*.

Refers to the person or case.

§ 1277.

The *common* substitution happens when the first institutus become not heir at all, is incapable of becoming so, or decline the inheritance; it is then called *vulgaris*, *quia vulgo et promiscuo omnibus hæreditibus à quovis testatore fieri potest*; it is most useful, for the heir may die before the testator, or become incapable by a *capitis deminutio*, which often happened at Rome, or the testator may fear his heir would not except the estate; thence it was a frequent practice to put in a slave, *novissimo loco in subsidium*, in case the estate should have run the gauntlet of the other substituted heirs. The form of this substitution was *Titius hæres esto, si Titius hæres non erit tunc Seius esto*.

Substitutions are of two sorts, common or vulgar, and pupillar or quasi pupillar. *Vulgaris*.

The *pupillary* substitution is calculated to supersede the heirs-at-law in case a child should die an infant, in which case, the substitution is made *secundum tabulas*,² that is, to determine who his heir should be, if he die an infant, this is to secure the infant's life from interested and base attempts on the part of the heirs-at-law; thus, a careful man, to keep the substituted heir in ignorance, sealed up the part of his will containing the substitutions, ordaining that it should not be opened before the child's death, if that event should happen during infancy.³

Pupillaria.

§ 1278.

The form used for the pupillary substitution was "*Filius meus hæres esto se filius meus hæres non erit; sive hæres erit et prius moriatur quam in suam tutelam venerit; tunc Seius hæres esto. Quasi substitutio* presupposes idiot children who might die in that state,—this was otherwise called *substitutio Justinæana*.⁴

Form of pupillary substitution.

¹ C. 6, 26, 8; P. 28, 5, 53; P. 28, 6, 1, pr.; Paul. recep. sent. 3, 4; Ulpian, Fr. 22, 33.

² P. 28, 6, 41, § 7. ³ Caius, Inst. 4, 2.

⁴ C. 6, 26, 8 & 4; P. 28, 6, 2, pr. Id. 10, §5.

To whom either is competent.

The vulgar substitution is open to any one,—the pupillary is confined to the father, and the quasi pupillary to the parents. The military to military men.

§ 1279.

Under unwillingness is included impotency, and *vice versa*.

In the vulgar substitution it may happen that the heir *will* not or *cannot* be heir; the first is called a *casum noluntatis*, the second *casum impotentiae*, according to others *potentiae*, which is shortly expressed thus: *casus noluntatis sub se complectitur casum impotentiae et casus impotentiae casum noluntatis*.

For exemplification,—A is heir, but if he *will* not accept the estate, B is heir. Now, if A die before the testator, he *cannot* become heir, and B consequently succeeds, for under the *noluntas impotentia* is tacitly implied; the same is the case if the testator only expressed the *impotentia*, and the heir *can*, but *will* not assume the inheritance, for in this case also the substitute is admitted.¹

§ 1280.

Whoever can be instituted can be substituted.

Plures in locum singulorum.

Inasmuch as substitution is the institution of a second or more heirs, he that can be instituted can also be substituted, and *vice versa*.

Many can be substituted, for one instituted, thus,—*Titius hæres esto, si Titius hæres non erit, tunc Tullius et Sempronius hæredes sunt*, or conversely.

Singuli in locum plurium.

One may be substituted for many instituted, thus,—*Seius et Caius hæredes sunt, si Seius et Caius hæredes non erint tunc Titius hæres esto*; or divers individuals in the place of divers other individuals, *singuli in locum singulorum*, thus,—*Tullius et Caius hæredes sunt, si Tullius et Caius hæredes non erint tunc, Seius in locum Tullii et Sempronius in locum Caii hæredis sunt*; again, co-heirs may be mutually substituted for one another generally, hence called *substitutio mutua* or *reciproca*, and sometimes ill-named *breviloqua*, thus,—*Seius, Sempronius, et Titius hæredes sunt siquis eorum hæres non erit tunc reliquorum qui velerit hæredes sunt*. Julian² has the following passage:—*Publius, Marcus, Caius invicem substitui, hærede mihi sunt; sic interpretanda sunt, breviter videtur testator tres instituisse hæredes et invicem eos substituuisse*,³ whence we may conclude, that this was not the usual form, a doubt being evidently cast upon the construction, by the fact of an opinion being considered necessary; the usual form was probably more precise, and may have been somewhat similar to the example given, or even more lengthy, and is merely this,—let A B C be my heirs, if A refuse, then

In substitutio reciproca.

¹ Walch, contr. p. 176; Stryk. de caut. et test. c. 18, § 9; Struv. ex. 33, th. 13; Voet. ad P. 28, 6, n. 12; Berger, resolut. P. 28, 6, qu. 1; Cocceii, jur. contr.

P. 28, 6, qu. 5; Pufendorf, tom. 2, obs. 98.

² P. 28, 5, 37, § 1; P. 28, 6, 45, § 1; Voet ad com. 25; P. 2, 20 & 22.

³ P. 28, 5, 37, § 1.

let B and C be my heirs if B refuse, then let A and C be my heirs, and if C refuse, then let A and B be my heirs; here, then, are three substitutions contained as it were in one, which is most succinctly expressed in the above example upon which Julian decides; in this case, each receives a share of the vacant share in proportion to that left him, thus,—if $A = \frac{2}{12}$, $B = \frac{4}{12}$, and $C = \frac{6}{12}$, and C declines, then $A = \frac{2}{12} + \frac{2}{12}$ and $B = \frac{4}{12} + \frac{4}{12}$ more in proportion to his original share.¹

The substitution of persons, who are nevertheless co-heirs, is by no means superfluous, notwithstanding that the *jus accrescendi* will come into operation in due course of law, for such substitution differs in many respects from that rule of law. First, then, as relates to the persons, the testator is at liberty to substitute co-heirs, who by the law of accretion would be superseded by others,—and in respect to the acquisition, the share vacated is, by the *jus accrescendi*, acquired *ipso jure*; but in the case of substitution, not until administration or entry, which is of consequence in the transmission of the inheritance. Lastly, the co-heir cannot decline the accretion, whereas the substitutus can, but he is not authorized to enter upon the estate if he be not also instituted heir.² Thus, the second heir takes the same portion as the first heir would have taken, in so far the testator may have made no other provision.³

Substitution of co-heirs, not superfluous, differs from the *jus accrescendi*.

Examples.

A and B are my heirs, A of $\frac{2}{3}$, B of $\frac{1}{3}$. C is substituted for A, and D for B; failing, then, A, C takes $\frac{2}{3}$, and failing B, D $\frac{1}{3}$. Now, in a reciprocal substitution of co-heirs, each takes so much of the unappropriated residue as he takes of the whole estate. Now, if A B C be heirs, A of $\frac{1}{12}$, B of $\frac{8}{12}$, and C of $\frac{3}{12}$, and are reciprocally substituted for each other, but A's portion becomes vacant, such portion must be divided into eleven parts, whereof B takes eight, and C three.⁴

§ 1281.

The substitute must survive the condition on which he is substituted,—for if he die, as has been seen, even during the period of the first instituted or previously substituted heir's deliberation, his heirs have no claim through him, for the inheritance had not vested in him at the time of his death. The interest in expectancy, moreover, naturally ceases on the previous substituted, or on the instituted heir's accepting the inheritance.

The substitute must survive the condition.

Now, if the testament provide, Let A be my universal heir, Examples.

¹ C. 6, 26, 1; P. 28, 6, 24; I. 2, 15, § 2.

² P. 28, 6, 45, § 1; Westphal. Test. § 616, as to the Falcidian portion in cases of legacy; P. 35, 2, 1, § 13, & 78, & 87, § 4; Voet. ad P. 25, 2, 20 & 22; Westph. Vermäch. et F. C. 2, 1151, etc.; Bech-

told de Bernsdorff, diss. de rat. fal. in sing. hæred. Goett. 1754; Cleemann, diss. de recepr. cohær. subet. Lips. 1770.

³ Ulp. nisi alia mens fuerit testatoris, 24, alleg.; Vinn. ad I. 2, 15, § 2, n. 2.

⁴ P. 28, 5, 24; C. 6, 26, 1; I. 2, 15, § 2.

but if he neither can nor will be my heir, let B be my heir ; and A, being in doubt whether he will or will not take the inheritance, prays the *tempus deliberandi*, during which the substitute dies, after which A declines the inheritance, to which the heirs of B lay claim ; they, however, cannot succede, for B did not outlive the condition upon which he was substituted, A having a legal right to his year's deliberation. In like manner, the entry or acceptance of A extinguishes the substitution, for the case or condition presupposed in the institution never accrued.¹

§ 1282.

The substituti
are substituti
instituto,

Inasmuch as substitutions were invented to prevent testaments being destitute of heirs, Heineccius establishes the maxim of,—whoso is substituted for a substitute, is substituted for the instituted heir. A is my heir, but if he fail let B be my heir, and failing B, C. A then is *institutus*, B *substitutus instituto*, and C *substitutus substituto*, for which very reason he is also *substitutus instituto*—that is, of A.

The heirs are A, B, X,—each of $\frac{1}{3}$.

A is substituted for B.

B is substituted for X.

and take as such.

A is *institutus*, B *substitutus instituto*, X *substitutus substituto*. Now, let it be supposed that A and B die, or decline before addition or entry, and X gets $\frac{2}{3}$,—the $\frac{1}{3}$ of B as his substitute, but, being also substitute of A, he gets his $\frac{1}{3}$, also *nam substitutus substituto etiam est substitutus instituto*.

Not by the jus
accrescendi.

It is erroneous to suppose that he obtains this $\frac{2}{3}$ *jure accrescendi*, and that the substitution is superfluous, for no question of cretion arises where the inheritance has not been entered upon ; and, even if it were applicable, it would not assign $\frac{2}{3}$ to X, *substitutus ab utramque partem sine distinctione admittitur*.²

It is curious that the Roman jurists occasionally admitted one as a co-heir in cases in which it was doubtful whether a substitute could succede as such ; on the first of these cases there is a very curious response by Julian.³

Case of a slave
being unwittingly sub-
stituted.

Caius is instituted, *Titius* is substituted, and *Sempronius* vulgariter substitutus. The first and third are free men, the middle man and first substitute turns out to be a slave, *Caius* goes off, *Titius's* master claims the inheritance as acquired by him through his slave, and *Sempronius* opposes his claim, and in equity on good grounds, for the question hinges on this,—either the testator knew *Titius* to be a slave or he did not ; if he did, he intended to substitute the master through the slave, in which case the master's claim is good ; or he did not, in which case his claim

¹ Sed vide case in Vinn. ad I. 2, 15, § 4, n. 2.

² I. 2, 15, § 3 ; Vinn. ad eod. n. 1 ;

Geiger, diss. de subat. substituti, Erlang. 1768.

³ P. 28, 6, 27.

is bad, for wills are to be construed according to the probable intention of the testator (*in testamentis plenius voluntates testantium interpretantur*,—and, again, *voluntas facit quid in testamento scriptum valet*¹), who in this case intended to benefit the individual, not the master—a presumption the more reasonable because the slave might have been transferred to another master before the inheritance fell to him.

But another case may arise. Let us suppose *Titius* to have been notoriously a free man at the time the testator wrote his will, and subsequently to have fallen into slavery; here the same argument will apply to contrary circumstances. The testator intended to benefit *Titius* individually, but circumstances have rendered his desire impossible; therefore, as *Titius* is individually incapacitated, the inheritance should devolve absolutely on the third person, *Sempronius*. Although this may seem logical and clear, yet Julian² decrees the master of the slave and *Sempronius* to be co-heirs. It is true, a commentator calls this judgment *anile et rusticum*—a strong term to apply to so great a lawyer; as Julian Alciat, one of the greatest jurists of the middle age, depending probably on a passage of Ulpian,³ supposes *Caius* to have been instituted, and *Titius* and *Sempronius* substituted as co-heirs, which would justify Julian's judgment; but this hardly appears to have been the case,—at all events, this question would form an excellent subject for the schools. Brunus,⁴ Vinnius,⁵ Otto,⁶ Puttmann,⁷ Finestres,⁸ and many others, have discussed this question, and to which the reader is referred should he wish to examine the matter at length, and the learned arguments on this subject. In the latter case, English lawyers would say that a common law court would perhaps decide in favor of the master of the slave, and that relief could only be had in equity by the second substitute, *Sempronius*.

Case of the slave wittingly substituted.

View of these cases by English law.

§ 1283.

Pupillary substitution is the substitution on the part of the father of an heir to his infant son, who may or may not have a *peculium*, and may or may not inherit from his father in addition.

Substitutio vera and respectiva.

If the infant have property the substitution is *vera*, but *respectiva* when the infant has a *peculium* as well as an inheritance in expectancy from the father; but if the child have no property from its father, and, in short, *peculia* property alone, the substitution is made on that account, for there is absolutely no second or after heir.⁹

¹ P. 50, 17, 10; P. 30, 1, 12, § 3.

² P. 28, 5, 40 & 41; I. 2, 15, 4.

³ Fr. 22, § 34.

⁴ Diss. in jus civ. p. 203.

⁵ Ad id § ult. n. 3.

⁶ Ad id § ult.

⁷ Prob. lib. 1, cap. 16.

⁸ In prælect. ad tit. Pan. de vulg. et pupill. substitut. p. 214; Höpfner, com. § 503, n. 1; Ulp. Fr. 22, § 34.

⁹ Merenda, contr. lib. 4, c. 6; Reuter, diss. de sub. recip. § 1, n. ; Vinn. 2, 17, n. 4; Thibaut, System des Pandrechts, § 696.

§ 1284.

The patria potestas the basis of pupillary substitution.

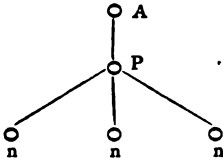
Of the pupillary substitution the *patria potestas* again forms the groundwork, and the reason wherefore the law has given the father the power of substitution is on account of the legal incapability of infants to make wills. Thus the father in fact testates for his son, naming an heir for him, and consequently he must first make his own will; hence it may be said that a will in which the father substitutes his son is double (*igitur in pupulari substitutione secundum prælatum modum, duo quodammodo sunt testamenta; alterum patris, alterum filii, tanquam se ipse filius hæredem sibi instituisset; aut certe unum testamentum est duarum causarum id est duarum hæreditatum*¹), but requiring only seven, not fourteen witnesses,² though the case is otherwise if the two wills be made at different times.

§ 1285.

Paternal authority the foundation of pupillary substitution.

The foundation of the pupillary substitution being, as it is, the paternal authority, this power vests in the father or grandfather (direct male agnate ascendent alone), but not in the mother; and the child born or yet unborn must be (*suus*) in his power, (yet how if they set up a house of their own?) be he father or grandfather,³ for *posthumi* can be substituted, being considered as already born in the eye of the law, because the substitution is to their advantage; but the grandfather cannot substitute should the children fall under the father's authority on the grandfather's death, hence the father must die before the grandfather. But if *Avus* has a son *Pater*, with his *Nepotes* under the paternal authority, and makes his will, can *Avus* pupillarily substitute the *nepotes*? certainly not, for, on *Avus's* death, *Pater* becomes *sui juris*, and the *nepotes* fall under *Pater's* power; but it is not so if *Pater* die before *Avus*, who is then at liberty to substitute the *nepotes* pupillarily.

Examples.



The formula introduced by the *lex Junia Velleia*, however, enables the *Avus* to get over this difficulty, by framing his substitution as follows:—*Filius meus hæres esto, si vero me vivo suus hæres esse desinit, nepos ex eo mihi hæres esto; et si hic ante pubertatem decesserit Pomponius ipsi substitutus esto.* Hence, applying this formula to the above case, *Avus* must say,—my son *Pater* is my heir; but if he pass from under the paternal authority in my lifetime, but my grandchildren *nepotes* remain thereunder,

¹ I. 2, 16, 2.

² I. 2, 16, 20, pr.

³ Hanoverian question, pro I. H. Boehmer, de statu lib. sui juri fact. per sep. vel.

nup.; G. L. Boehmer, 1 Exer. ad Pand.; contr. Grupen, discep. eptat. forens, 208; Puffendorf, v. 3, obs. 1; Runhartha ad Christin, vol. iv. obs. 27.

they shall be my heirs, but if they die under age *Pomponius* is substituted in their place.

§ 1286.

Upon the same principle of advantage to the child, a father may substitute his disinherited children, for disinheritance by no means dissolves the paternal authority. The father cannot, however, compel the substitute of a disinherited child to pay legacies, execute trusts, and the like, for no one can burden with legacies and trusts one whom he does not at the same time honor by leaving him legacies.¹

A father may substitute pupillarily a disinherited child.

§ 1287.

Emancipation destroys the substitution, for the law requires that the child should be under power not only at the time the testator made his will, but also at the time of his death,² *si quis ex his mortis quoque tempore non fuit in familiâ substitutio pupilaris sit irrita*. Arrogation of the infant after the father's death destroys the substitution, because the arrogator must give caution to pay over the infant's property, in case of his death, to those who would have received it had the arrogation never taken place, and such person is the substitute.³

Substitution, how destroyed by emancipation;

by arrogation.

§ 1288.

Male infants can only be substituted until their fourteenth, and females until their twelfth year,⁴ but may be for a shorter period, in which case it expires with such period; but if it be made for a longer period, for instance, till minority ceases, or till twenty-five, then it holds good till fourteen and twelve,⁵—the remaining period, however, being illegal, is not taken cognisance of.⁶ The Germans, however, allow it to continue for the remaining period as a trust or *fidei commissum*.⁷

Duration of the pup. subst. till the age of fourteen and twelve.

Papinian has a somewhat remarkable passage,—*cum pater impuberi filia, quæ novissime diem suum obiisset, tabulas secundas fecisset, et impubes filia superstito sorore pubere vita decessisset, irritam esse factum substitutionem placuit, in persona quidem prioris, quia non novissima decessit, in alterius vero quia puberem ætatem complevit*. Now the father has two daughters under the age of puberty, and pupillarily substituted,⁸ that one who should survive,

Case of the survivor of two daughters being substituted.

¹ C. 6, 38, 24; Vinn. ad 2, 17, 4, n. 3; Westphal. von Vermächtnissen, th. 1, § 99. It is difficult to suppose a child of such tender years deserving disinheritance, or it may be done with a laudable view, vid. querela inoff. test. ad fin.

² P. 28, 6, 41, 2; Hunn. resolut. p. 461, qu. 11.

³ P. 1, 7, 17, 1; P. 1, 7, 18; Bachov.

ad Treutler, v. 2, diss. 11, thes. 8, lit. D, thes. 9, lit. F.

⁴ P. 28, 6, 7.

⁵ I. 2, 17, § 8.

⁶ P. 28, 6, § 41, 7; P. 28, 6, 37; I. 2, 16, § 6.

⁷ Stryk. caut. test. cap. 18, membr. 2, § 24; Lauterbach, coll. de Vel. P. S. § 25.

⁸ Tabulas secundas fecit.

for her who should first die. The elder attains puberty, and the junior dies under puberty. The substitution then fails, for the elder daughter having attained puberty, the substitution quoad her is at an end. The younger has not died first but last, hence the substitution never affected her.

§ 1289.

Pupillary substitution supposes a double institution of heirs.

By a void testament.

The father cannot name an heir for his son and die himself intestate, the *pupillare testamentum* being considered as a *pars et sequela paterni testamenti*, or as the *accessorium*, which always presupposes a *principale*; but it is not necessary that they should be in the same will, for they may be *diversis tabulis*, executed at different times; moreover, the father's will may be nuncupative, and that of his infant child in writing, or *e converso*,¹ but of course the father's will must be of a date prior to that containing the pupillary substitution, of both may be done, *actu eodem conjunctim*, or *uno contextu*, in which case it matters not whether the child's or his own heirs be first mentioned. As the father's testament is so intimately connected with that of the son, it follows that if it become void, *ruptum*, or *irritum*, or *destitutum*,² the pupillary substitution is void also; still, an exception is made when the father's will is declared *inofficiosum* or *nullum*, according to the provisions of Novell 115. A father has disinherited his infant child without assigning just and good cause, and pupillarily substituted him; the will is impeached and upset, in which case it is the general opinion that the substitution is valid, for in fact the institution of the heir is all that is overturned,—the other provisions remain, however, in force.³

§ 1290.

When the child dies in infancy.

In cases in which the child dies in infancy, the substitute acquires not only the father's property but the child's *peculium* also,⁴ taking precedence of all its relations, even of the mother herself; still, it would appear that she may claim her legal share,⁵ inasmuch as the will is made in the child's name, a view confirmed by the Code,⁶ which decrees that no one shall be deprived of his legal share under any circumstances whatever;⁷ but Ulpian,⁸ on the other hand, states clearly that the mother in this case is debarred of her legal portion, in which Bonifacius⁹ concurs, whereupon Dr. Höpfer remarks with some naïveté that it is

¹ P. 28, 6, 20, § 1; I. 2, 16, § 3.

² Vinn. 217, pr. n. 9. The substitution is not avoided by the child instituted in the father's testament abstaining from the inheritance.

³ Vid. post de querela inofficiosi.

⁴ P. 28, 6, 10, § 2; P. 28, 6, 5; Klein, jurist Bib. 26, 230.

⁵ Brunnemann ad, 5, 2, 8, 5; Finkelthaus, obs. 29, n. 17; Harparch, I. 2, 17, n. 47.

⁶ C. 2, 28, 30, & 32.

⁷ P. 5, 2, 8, § 5.

⁸ In vi^o, 3, 11, 1.

in vain the commentators dispute in the face of such positive laws.¹

§ 1291.

Substitutio quasi pupillaris, or *exemplaris*,² so called from its similarity to the foregoing, also termed *Justinianeæ*, because permitted by Justinian³ without the imperial dispensation thitherto necessary, is founded on *humanity*, because the child might die *mente captus*. It differs from the foregoing in this, that all ascendants,⁴ including the mother, could make use of it, nor is it required that the children should be in the father's power, nor that the child should be an infant. The child feeble in intellect must be instituted before all other persons; but if the imbecile person have no children, his or her parents and brothers and sisters must be instituted,⁵—as, for instance, the mother for her legal portion, &c., or *e converso*; but if these be wanting, the testator is free to institute whom he will.

Substitutio quasi pupillaris.

With respect to who are to be esteemed such, the law determines,⁶ *iste tamen filius vel filia, nepos vel neptis, pronepos vel proneptis mente captus vel mente capta perpetuo sit*; and it would appear that though this is a *jus singulare*, and as such not to be extended to like cases, as of *furiosi*, *muti*, *prodigi*, and others not permitted to make wills, as some suggest, yet that such maxim is incorrect, and that it is capable of extension⁷ so far as such persons may be incapable of making a will, but that if they afterwards become capable of testation the substitution will become of none effect,⁸—*sed quære*, if the faculties of an imbecile person become clear, and he afterwards relapse into imbecility,⁹ Vinnius thinks the substitution remains in force where the descendent himself has not testated during the period he was of sound mind, and the imbecility has recurred during the life

Whether extendible.

¹ Carpazov, pt. 3, c. 8 & 1; Hartmann, Pistor. obs. 30; Merenda, contr. lib. 3, c. 40; Faber, conj. 15, 9; Stryk. de caut. test. cap. 18 membr. 2, § 16; Franzk, ex. 6, qu. 7; Puf. tom. 3, obs. 117; Heisler, diss. de pup. subst. matrem excludente, Madihn tr. de subst. impub. § 23; Klüber, Kl. jur. bib. xv. 375; Decis Capet. tom. 1, decis 66; Küstner, diss. de pup. test. præterit. impuberis mater rato, Lips. 1783.

² Duarrenus, disp. annivers. lib. 2, cap. 7, calls it innocent.

³ C. 8, 26, 9; I. 1, 11, § 3, 4.

⁴ Which substitution is to be preferred when both father and mother substitute an imbecile child and institute other heirs as well? Some prefer the paternal; others hold the paternal good as to the paternal, and the maternal as to the maternal property. With respect to any other property

which may be in question, some prefer the paternal substitution, but others hold in favor of a division.—Martini, de subst. pup. cap. 4, § 3. But how can two substitutes co-exist, as a *paganus* cannot die with more than one testament? Vinn. l. c. n. 2.

⁵ Nov. 115; Stryk. de caut. test. cap. 18, § 20.

⁶ C. 6, 26, 9.

⁷ Hunnius in resolut. p. 4, 74; Perez, ad Cod. 8, 26, n. 36; Giphani, expl. diff. L. L. Cod. 6, 26, p. 60; Faber, prælect. c. 3, 26, n. 3; Voet. c. 8, 26, n. 6.

⁸ Stryk. caut. test. c. 1, memb. 3, § 13, 14; Struv. ex. 33, th. 36; Müller, Vinn. 2, 17, ad § 1, n. 3; Martini, l. c. cap. 3, § 15, seq.; Lauterbach, coll. th. p. 2, 17, § 42; Argum. P. 28, 5, 6, § 2; P. 28, 6, 4, § 2; I. 2, 19, § 4.

⁹ Vinn. ad I. 2, 16, n. 8.

of the testator, and that he was in that state at the testator's death.¹

§ 1292.

Military substitution.

Military men are also privileged in this respect, in this that they can substitute beyond the years of puberty,² and even their emancipated children, in respect of property, they may derive from them;³ moreover, they can substitute *directe* "if he may become heir," but a *paganus* only in case "the person named as heir does not or cannot become heir," otherwise such direct substitution is treated as a *fidei commissum*; if such intention appear⁴ with the soldier, it is a direct substitution materially differing from a *fidei commissum*,⁵ and may run thus,—“A shall be my heir if he become so and die, or become my heir and die before his thirtieth year, B shall be substituted in his place;” nevertheless, the soldier can only substitute in respect of property to be inherited of himself, not in respect of that which may belong to the child as his own property,⁶ but the general rule, that the vulgar substitution comprehends the pupillar, is not applicable to the privileged military testament.⁷ Lastly, the soldier is not compelled to begin by naming his own heir, as others must do.⁸

¹ P. 28, 5, 6, § 2; I. 2, 19, § 4; P. 28, 6, 41, § 2; I. 2, 12, § 1.

² P. 28, 6, 115, C. 6, 26, 8; Cujac. 12 obs. cap. 27.

³ P. 29, 1, 41, § 4; Donell, com. 6, 28, n. 10.

⁴ Costa, l. c. Struv. ex. 33, th. 40; Bauer, l. c. § 21.

⁵ I. 2, 23.

⁶ P. 29, 1, 5.

⁷ C. 6, 26, 8; Westphal. de testam. 794; Schweppe, Röm. Privat. 747.

⁸ P. 28, 6, 2, § 1.

TITLE XII.

Quibus Modis Testamenta Infirmantur—Inofficiosa Testamenta—Lex Furia—Voconia—
Falcidia—Exheredatio—Præteritio—Querela Inofficiosi Testamenti—Testamenta Nulla
—Injusta—Destituta—Rupta—Irrita—Recissa—Codicilli—Fidei Commissa Universalialia
—Senatus Consultum Trebellianum—Pegasianum—Bequests in Trust.

§ 1293.

In the more remote times of ancient Rome, when the provisions of the Twelve Tables¹ were literally adhered to, no limit was set to legacies; parents and children, and brothers and sisters might disinherit each other without let or hinderance, a practice as injurious to the heirs as to the legatees, because, when an inheritance had been burdened with legacies to such an extent as to render it disadvantageous or worthless, the heir repudiated it; and, the testament having thus become destitute, the heir-at-law stepped in and the legacies were all superseded.² This free right of legacy was so often abused by the exheredation of those who had the nearest claims of blood, that the centumviral court lent its aid to correct it,³ by the invention of the *querela inofficiosi testamenti*, which consisted, as will be hereafter seen more at length, in the impeachment of the will on the ground of the imbecility of the testator, on proof whereof the will itself was produced containing the exheredation clause;⁴ it is probable that the legatees were

Origin of the
portio legitima.

Inordinate legacies

led to the
querela inoffi-
cioso testamenti
by the centum-
viri.

¹ Pater familias uti legasset super familiæ pecuniæ tutelæque suæ rei ita jus esto, Ulp. Fr. 11, 14, & § 1216, § 1181, h. op.

² Gaius, 2, 224.

³ This is the view of Hotomann; Cujacius, obs. 2, 21, & 17, 17, thinks there

was a lex Glia existing A.V.C. 504 to this effect; Augustinus de leg. et Sctm. in L. Glia; Gravina de leg. et Sctm. 80, p. 649, seq.; Grut. Inscr. 290, n. 11; Hein. A. R. 2, 17, § 5.

⁴ Val. Max. 1, 7 & 8.

heard in support in their right, the heirs-at-law showing cause against the will, who, if they made out their case, the testament was set aside. The practice of this court of equity soon established precedents of cases in which it would set wills aside. The danger thus incurred by the legatees was doubtless the origin of the testator leaving his next of kin such portion of the inheritance as should be an answer to the *querela inofficiosi testamenti*,¹ if brought against his will after his death,—this share obtained the denomination of *portio legitima*; but as, on the one hand, this principle had been established for the protection of the relatives of the testator against the law of the Twelve Tables, so its great extension so circumscribed the free right of testation as to be considered oppressive; on the other hand, no man could be sure his will would not be set aside as inofficious, and something more definite than the authority of the *res judicatæ*, which had extended the right of *querela* to distant relatives of the testator, was required.

Portio legitima. This appeared in the shape of the *lex Furia* before mentioned, which was, however, faulty in principle, because it fixed 1,000 asses,² as the maximum of a legacy, without any reference to the total amount of the *corpus* left by the testator: this extended to the sixth degree, except as to cognates and the children of the *Sobrini*.³ But this law was as injurious to both parties, the legatee and the heir, as the old practice: if the estate were considerable, the legatee received a mere nominal sum compared with the whole; and if it were large or small, these legacies, multiplied to one or many, would exhaust it. Citizens of the first class being now forbidden, by the Voconian law of 585 A.U.C.,⁴ to institute women heirs, lest they should by accretion obtain the whole inheritance; and as in that case nothing would have been left them but these miserable legacies, that part of the *lex Furia* was abrogated as to citizens in the first class (*census*), who were allowed to leave women as well as men legacies, provided they did not exceed together the share which fell to the share of the heir or co-heirs. Walter⁵ supposes the *lex Furia* still remained in force as far as regarded the lower classes of census. Both these laws were superseded by the *lex Falcidia*, with which we have more particular concern.

The *lex Furia* superseded the equity rule.

Its disadvantages.

Remedied by the Voconian law.

Which was again superseded by the Falcidian law.

§ 1294.

Its provisions.

The first head of this law, the history of which has already been given,⁶ revives the free right of testation, and the second adds a proviso that at least a fourth must remain over for the

¹ Winkler, *dis. de diff. inter test. nullum ruptum et inofficios. c. 3*; Zippert *dis. (Pand. Nettleblatt) hist. jur. civ. de leg. parent. p. 35*.

² *Gaius*, 2, 225, & 4, 23; *Ulp. Fr.* 1, 2; *Theophil.* 2, 22, pr.

³ *Frag. Vat.* § 301; *Ulp.* 28, 7.

⁴ *Vid.* § 1182.

⁵ *Walter Gesch. des R. R.* § 641.

⁶ § 1183, h. op.

heir,¹ which could not be burthened with legacies; secondly, should the testator by legacies infringe on this *quarta Falcidia*, the heir can subtract from the legatees rateably, so as to reserve for himself a clear fourth without upsetting the testament,—which has been preserved in most continental codes by reason of its obvious equity.

Let an estate be supposed to amount to	Aurei. 12,000
The testator may dispose by legacy of	9,000
Leaving for the heir one-fourth of the whole . .	3,000
	<hr/> 12,000

But 6,000 are left to A,	Aurei.
3,000 „ B,	
1,000 „ C.	
<hr/> 10,000	

10,000 in all to A, B, C.
Hence 2,000 only remains for the heir, who can therefore deduct ten per cent. from each heir,—

12,000

Thus 5,400 will remain for A,	
2,700 „ B,	
900 „ C.	
<hr/> 9,000	
3,000 „ total of legacies.	
<hr/> 12,000	

12,000 total amount of the *corpus hereditatis*.

§ 1295.

The Falcidian law provides that the *testamentary* heir only shall have this right of subtraction, which, it will be seen, was afterwards extended to *intestate* heirs and trustees.

The next question relates to the persons who have claim to this *portio legitima*. Sons, daughters, grandchildren, and great grandchildren have a claim upon it. Legitimate children can claim it from the father alone, but the illegitimate also from the mother; but if there be no children, or are such excluded by testament without the power or wish of upsetting it, this portion falls to the parent's grand or great grand parents,—that is to say, in both cases the legal portion follows the descending or ascending

What persons are entitled to the *portio legitima*.

The heirs in the direct ascending and descending line.

¹ P. 35, 2, 1, pr.; Gaius, 2, 227; Ulp. Fr. 24, 32; Dio. Cam. 68, 33; I. 2, 22, pr.

In the collateral line.

In the case of a turpis person being instituted. Germani consanguinei and uterini.

The collateral line.

line; failing these, and in the case of their disinheritance, or inability, or unwillingness to impeach the will, the legal portion falls to the brothers and sisters, or collateral line, but then only in the case of an infamous person having been instituted; and here it must be remarked that the claim on the legal portion is not to be confounded with intestate succession. *Fratres germani*, brothers, sons of the same father and mother—and *fratres consanguinei*, brothers of the same father but of different mothers, have this claim; but it is doubted as to the half-blood, *uterini*, those of the same mother but of different fathers. The Codex certainly excludes them, and the Novellæ also, according to the better opinions.¹ Children of brothers and sisters,²—that is to say, uncles, and aunts, and nephews, clearly have no claim to the *portio legitima*.

In the collateral line the brother is not bound to leave his sister the legal share, except he name a person as heir *infamia juris laborans*, or who has the *levis notæ maculam* in the sense of the Roman law,—as, for instance, a *mulier quæstuaría*. Before the time of Constantine the Great, it was doubtful whether the *uterini* could maintain the *querela inofficioso testamenti*, or whether they were only admitted to it as against a *turpis persona*, for Constantine certainly confined it to the *germani* and *consanguinei*. Thus,³ *Fratres uterini ab inofficiosis actionibus arceantur, et germanis tantummodo fratribus adversus eos duntaxat institutos hæredes, quibus injustas constiterit esse notas detestabilis turpitudinis, agnatione durante, sine auxilio prætoris petitionis aditus reseratur*. A slave being a *hæres necessarius* is not *infamis*, because he does not benefit by the property. Actresses, and the like, were among those who had the *levis notæ maculam*. Thus, *servus necessarius hæres instituendus est, quia non magis patrimonium, quum infamiam consequi videtur. Unde adparet, actionem inofficiosi fratribus relaxatam, cum infamiæ aspergitur vitii is, qui hæres extitit, omniaque fratribus tardi, quæ per turpitudinem aut aliquam levem notam capere non potest institutus. Ita in hac quoque parte, si quando libertis hæredibus institutis fratres fuerint alieni, inofficiosi actione præposita prævaleant in omnibus occupandis facultatibus defuncti, quas illa perperam ad libertos voluerat pertinere*.

Justinian consolidated these

Justinian consolidated these two laws,⁴—*Fratres vel sorores uterini ab inofficiosi actione contra testamentum fratris vel sororis*

¹ Boehmer, diss. de querel. inoff. don. frat. § 3 in Elect. I. C. 1, p. 250; Püttmann, diss. de querel. inoff. frat. uterin. haud conced. Lips. 1769, in opusc. num. 1; ejusd. progr. vind. diss. cont. ibd. n. 3; Lorenz. diss. utrum. frat. uter. turpi hæred. scrip. leg. relig. sit, necne? Goett. 1774, § 6, seq.; Westenberg, de leg. diss. 2, 4; Marchart interp. I. C. lection. 1, 14, p. 66; Boehmer, diss. de querel. inoff. frat. con-

sang. § ult.; ex ad Pand. vol. ii. p. 815; Finestres, ad tit. de inoff. test. 5, 71, seq.; Trummer, diss. de querel. inoff. frater. uter. haud deneganda, ed. 1783.

² Contra, Boehmer, diss. cit. § 25; Toul- lien, in coll. p. 237; sed vide Püttmann, interp. 31; Glück, opusc. fascic. 3, p. 9.

³ C. Th. de inoff. test. 1 & 3.

⁴ C. 3, 28, 27.

penitus arceantur; consanguinei¹ autem durante agnatione vel non contra testamentum fratris sui vel sororis de inofficiosi quæstionem movere possunt, si scripti hæredes infamizæ vel turpitudinis² vel levis notæ macula adspargantur, vel liberti qui perperam, et non bene merentes,³ maximisque beneficiis suum patronum adsequuti instituti sunt; excepto servo necessario instituto, and, as will have been observed, added and altered them in many places.⁴

former laws as to the Q. I. T. of the fratres uterini germani et consanguinei.

Now, the question arises as to whether the 18th Novella repeals this law: the Codex excludes the *uterini* because, not being *agnati*, they had no right of intestate succession; on the other side, it is urged that all intestate heirs have not a claim on the *portio legitima*; moreover, that the *uterini* inherited *ab intestato*⁵ at that time, although they had no *querela*: the reply is, that if they were excluded from the *legitima* only because they did not inherit *ab intestato*, that when they could, the right to the *legitima* followed; moreover, that it is a special grace to the *uterini*, still they could not be admitted to the *querela*. Again, it is asserted that Tribonian adopted the law of Constantine in 528 into the old Codex, and forgot to strike it out in the new edition in 532. Upon the whole, the case is stronger against than for the *uterini*.

Question whether the 18th Novel. repealed this law.

§ 1296.

The old law fixed one-fourth as the amount of the *legitima ab intestato*, but by the 18th Novella it varies from the half to a third, according to the number of claimants,—where four or less claimed it was $\frac{1}{3}$, but where five or more $\frac{1}{2}$, which will be noticed at length under intestate succession.

Chief reasons by which the *querela* is regulated.

There are some important rules respecting the *legitima*,—the first is, that as between parents and children, the obligation is not only to leave the *legitima*, but also to institute as heir. By the old law it was indifferent under what denomination the *legitima* was acquired and the will held, whether it was left *titulo legati*, *fidei commissi*, *dotis*, *donationis propter nuptias*, or *mortis causâ*; but Justinian⁶ directed children and parents to be instituted heirs if they had not deserved *exheredatio*, and that it should not suffice to leave them their *legitima*; hence they must be instituted, and if so instituted, the *legitima* may be left then under any title whatsoever; thus the following bequests would be valid:—"All my children shall be my heirs; I bequeath to my eldest son, who must be content with his *legitima*, a legacy of 1,000 aurei, which is as much and more than his legal share." In like manner, the testator may use any words implying an institution, as, "I leave,"

Parents and children must be instituted, besides the *legitima*.

¹ Pro germani consanguinei.

² On account of the difference between *sui* and *emancipati* having been abolished by Anastasius, C. 5, 30, 4.

³ Infamizæ and turpitudinis aspersi synonymous here.

⁴ A new exception by Justinian.

⁵ C. 6, 37, 14.

⁶ Nov. 115.

"I bequeath," &c., but he must not expressly or impliedly declare such son shall not be his heir, for that will avoid the testament.

The legitima must be free of burdens.

The *legitima* must be *absque onere*, *absque gravamine*, &c., without service or duty in respect thereof, or any condition or object;¹ but if he wish to do this, the testator must bequeath more than the *legitima*, and add, that failing such condition, &c., he shall only have his *legitima*, but he may repudiate the excess and take his *legitima* alone.

The deficiency may be supplied by the *actio expletoria*.

Lastly, if one be instituted as heir with less than the *legitima*, the testament stood, but he might bring his *actio expletoria*, otherwise called *condictio ex L. 30 C. de inoff. test.* for the deficiency.

§ 1297.

Ex or disheredatio.

Ex or *disheredatio* is the express exclusion of kin to whom a portion of the entire inheritance of right belongs, from the whole thereof; for if ever so little be left to an heir, he is not disinherited, less so if nominated to his entire legal portion,² thus it is no disheredation to exclude one who has no claim on a legal portion, as an uncle or nephew; the exheredation is express when the declaration is made clearly that such and such a person shall not be my heir, and the form of words is immaterial, thus, by the Roman law it was a disheredation to say *ille filius meus alienus meæ substantiæ fiat*.³

Præteritio.

Præteritio differs from disheredation, and is passing the heir over in silence; he need not, however, be passed over in total silence, thus,—*cum filius meus ingratus erga me fuit, Sempronium hæredem instituo*;⁴ thus, then, if I neither nominate one heir, nor expressly declare that he shall not inherit, *non exheredatus sed præteritus est*.

Let us now inquire as to the *form*, the *cause*, and the *effect* of disheredation and præterition.

§ 1298.

Disheredation must be absolute.

The old Roman laws provide that the disheredation of children shall be *pure*, and this Hermogenianus and Ulpian say expressly,⁵—the former gives the reason, *certo enim iudicio liberi à parentum successione removendi sunt*. Papinianus⁶ and Ulpianus⁷ are of opinion that a man may make his son his heir, *filium suum sub conditione protestiva*; but if he do this, he disinherits him impliedly in case the condition be not fulfilled. Marcian⁸ observes that a man may disinherit his son under a casual condition, by placing him in the adverse category. If this be the case, where is the

¹ C. 3, 28, 32 & 36, § 1.

² F. C. Book, Schleswig, 1799.

³ C. 6, 28, 3; Bauer, diss. circa form. exhær.

⁴ An heir is said to be in *condizione tan-*

tum positus when the words are *si filius meus hæres non erit, Scius hæres esto*.

⁵ P. 37, 4, 18; P. 28, 2, 3, § 1.

⁶ P. 28, 7, 28.

⁷ P. 28, 5, 4.

⁸ P. 28, 5, 86.

certum judicium? the question savors, however, somewhat of sophistry.

§ 1299.

Secondly, the form must apply to all co and every substituted heir, *feri debet ab omnibus hæreditibus et ab omni gradu*,¹ that is, if several co-heirs be nominated in various clauses, the disherition must be so expressed as to apply to all, not to one of the co-heirs.

The form of exheredation.

Ex gr. The words,—*A hæres esto, Filius exhæres esto*, or *A hæres esto, B hæres esto, Filius exhæres esto*, would be a disherition bad for uncertainty. Thus, it should be,—*A hæres esto, filius exhæres esto, B hæres esto, filius exhæres esto*, or *Titius, excluso filio, hæres esto, Caius hæres esto*, would be wrong, for it must run,—*Titius et Caius excluso filio hæredes sunt*, or *Filius exhæres esto, Titius et Caius heredes sunt*. Thus also, in a substitution of one heir for another, the disherition must apply to all heirs equally, thus,—*Titius hæres esto*. Thus, the testator must not say,—*Titius hæres esto, si Titius hæres non erit, Caius hæres esto, filius exhæres esto*, nor *Filius exhæres esto, Titius hæres esto, si Titius hæres non erit, Caius hæres esto*, but *Titius hæres esto, Filius exhæres esto, si Titius hæres non erit, Caius hæres esto, Filius exhæres esto*; or shorter,—*Filius exhæres esto, Titius hæres esto, si Titius hæres non erit, Caius hæres esto*. These forms are of course not in use among those modern nations who adopt the Roman law.²

The sons must be disinherited by name, the daughters could be disinherited generally and undefinedly *inter cæteros*; thus, in the case of two sons, a daughter and grandchild, the testator might say,—“My two sons shall be my heirs, I disinherit all the rest,”³ or *cæteri omnes filii filiaque meæ exhæredes sunt*, was held good by Paulus.

Sons by name, daughters generally.

One is disinherited if either named or accurately described *aliâ certâ demonstratione, quæ vice nominis fungitur*; thus Ulpian⁴ thought,—hence, “my eldest daughter shall be disinherited, my son the student of theology shall be disinherited”;⁵ but if the testator have an only son, he can say—“my son shall be disinherited.”

By Justinian's constitution, all descendants without distinction of degree of sex (sons, daughters, grandchildren, &c.) must be disinherited by name.⁶ The same formula should be used at present among nations adopting the Roman law.⁷

Justinian decreed that all descendants without distinction should be disinherited by name.

When these forms are observed it is called *exhæredatio*, when not *præteritio*.

¹ P. 28, 2, 3, § 2.

² Bauer, l. c. § 9.

³ P. 28, 2, 25.

⁴ P. 35, 1, 34.

⁵ Vinn. ad pr. l. 2, 13, N. 5; Poll. l. c. cap. 72; Leyser, sp. 356, med. 6.

⁶ C. 6, 28, 4, ad fin.

⁷ Poll. c. 18, n. 1; Boehmer, intr. in jus dig. de lib. et post. § 10.

§ 1300.

The Novella required a good cause to be assigned for exheredation.

By the law of the Novella,¹ *good reasons* must be added in the will to the form of the *actus* in the disinheritance of parents and children; but the old Roman law, it has been seen, did not require, in cases of disinheritance, that the cause thereof should be mentioned in the will; but the person so disinherited could, if he thought himself aggrieved, institute a *querela inofficiosi testamenti*, which was tried by the *centumviri*,² or the judges having jurisdiction in such matters, giving judgment according to their discretion, in which the *onus probandi* lay on the heir.³ Justinian directed the reason always to be stated,⁴ in the 115th Novella: he went further, in fixing certain grounds of disinheritance between parents and children; the same applied to preterition, one or more of which are to be expressed in the will; he added nothing as to brothers and sisters, with respect to whom the old law remained in force, and it is an error to believe that the 22nd Nov. 47 applies to such persons, with which compare 118th.⁵

§ 1301.

Valid causes for which parents can disinherit children.

The following are the causes for which children can be disinherited by parents:—

1. Verbal injuries, abuse of parents.
2. Real injuries, striking parents.
3. Attempting life of parents.
4. For accusing his parent of a criminal offence (*accusatio*)—treason forms an exception.
5. Or of a civil offence, whereby he is damaged (*delatio*).
6. When the son consorts with conjurors or poisoners (*maleficiis*).
7. For preventing the parent from making a will by threats, contrivances, or otherwise; if the parent die in consequence intestate, the child's share is confiscated to the exchequer.
8. For refusing to ransom parents taken prisoners of war.
9. For turning sectarian, that is, non-conformity with the tenets of the councils of Nicea, Ephesus, Constantinople, and Chalcedon.
10. For not taking care of parents during temporary aberration of mind.⁶
11. For lying with his stepmother or father's concubine.
12. *Si inter mimos vel arenarios sese filius sociaverit*, for associating with buffoons and tumblers against the father's will.
13. If of the age of eighteen, for not bailing parents out of prison for debt on request.

¹ Nov. 115, 6, 28, 4.

² *Siccamæ de jud. centumv. lib. 2, D. Zepernik.*

³ Z. E. Bauer, *dis. cit.* § 18.

⁴ C. 6, 28, 30.

⁵ Cocceii, *jur. contr. tit. de inofficioso test. qu. 9*, ibique Emminghaus in not.

⁶ These two do not apply to a daughter; the 13th, because a woman could not by law give bail.

14. The daughter for marrying against the parents' consent, or leading a disreputable life ; as, for marrying a slave for lewdness, marrying against her parents' consent, if the parents have endeavoured to find her a husband.¹

§ 1302.

Parents can be disinherited by their children for eight causes :—

1. For accusing (*accusatio*) or giving information (*delatio*) against their children for a capital offence, treason always excepted,—*si ad interitum vitæ liberos tradiderint citra causam tamen quæ ad majestatem pertinere cognoscitur*.

Valid causes for which children can disinherit parents.

2. Attempting the children's lives.

3. Lying with the stepdaughter or son's concubine.

4. Preventing the children from making a will.

5. Not ransoming them when in captivity.

6. Not taking care of children during temporary aberration of mind.

7. Becoming heretics.

8. The father or mother can be disinherited by the children, by the one giving the other poison, or otherwise attempting the life, so that the party die or lose the understanding.

A question arises as to whether any other reasons be admissible, for Justinian says,—*præter ipsas nulli liceat ex aliâ lege ingrati- tudinis causas opponere nisi quæ in hujus constitutionis serie continetur* ; it, however, cannot ever have been Justinian's object, as Cocceii² observes, to have let worse offences go unpunished.³

Are other reasons admissible?

§ 1303.

A soldier by reason of his peculiar privilege,⁴ or a mother, or grandmother, because their children are not under their power, may pass by their children in silence in their testaments, and it amounts to a disheredation as much as if they had been disinherited by name ; yet, by a later law,⁵ if in the mother's or grandmother's will they be passed by without just cause, the will may be set aside as inofficious.

Military privileges.

§ 1304.

It has been seen that a valid cause was indispensable to exheredation or preterition ; means were, however, open to him who had been improperly deprived of the share legally due to him.

By the strict rule of law, before Justinian, the testator passed over descendants who were no longer under his paternal authority ; but to remedy the evident injustice of this, the prætorian edict allowed such emancipated persons to impeach the will, and petition for a *bonorum possessio contra tabulas*.

The conflict of law and equity in cases of exheredation and preterition.

¹ This does not apply to the son.

² In jur. controuv. tit. de inoff. test. qu. 13.

³ Vinn. ad pr. 1, de inoff. test. n. 2 ;

Bynkershoek, obs. lib. 5, c. 5.

⁴ I. 2, 13, § 6, 7.

⁵ Nov. 115, 3.

Moreover, strict law required no cause for the disheredition or preterition of parents or children in the paternal power.

Equity protected such when disinherited or passed over without good reason by the *querela inofficiosi testamenti*.

Strict law did not require brothers and sisters to be instituted.

Equity allowed such a remedy when a *turpis persona* was instituted.

The new law of Justinian¹ distinguishes between the cases when a valid ground is stated and when not, allowing the institution of the heir to be impeached without affecting the testament generally. But the form of the Novella must be observed, for otherwise the *querela* will be *nullitatis*, not *inofficiosi*, which consists in the grounds being assigned as the law requires.

§ 1305.

The differences between the remedies against *testamenta nulla* and *inofficiosa*, and where the *bonorum possessio contra tabulas* may be prayed.

A *testamentum nullum* and *inofficiosum* are, therefore, as different as the remedies applicable to them,—the *querelæ nullitatis inofficiosi* and *bonorum possessio contra tabulas*. Now, if a testament be inofficious only, it is so far good as to supersede a previous will, which is then *ruptum*; but if a testament be *nullum*, it does not so supersede a former will.

Another difference is, that the *querela nullitatis* endures thirty years, and affects the heirs; a *querela inofficiosi* only five, and does not affect them.

The *querela nullitatis* upsets the testament.

The *querela inofficiosi* the institution of the heir only.

The defendant can, in the case of an inofficious suit, plead the truth of the cause of disheredation; but in a suit of nullity he cannot do so.

The *bonorum possessio* differs from both,—first, in the limitation of the action, which in the case of parents and children must be instituted within a year; but in that of other persons, within one hundred days, reckoned from the period of the fact of the delation of the inheritance coming to the knowledge of the plaintiff.

In *summa* the *querela nullitatis*, by the old law, annihilated the whole testament; the *querela inofficiosi*, the institution of the heir only; and the *bonorum possessio contra tabulas*² (*B. P. c. T.*), while it assigns the inheritance to the petitioner, compels him in certain cases to pay the legacies.

§ 1306.

Who can and who cannot be passed over. Conflict of the old and later Roman law.

The later Roman law differed essentially from the old in respect of the persons who could and those who cannot be disinherited or passed over.

¹ Nov. 115.

² Reinhardt, *diss. de quer. null. et inoff. test. differentiis et usu earundem practico*, Goett. 1736; Haubold, *diss. sub. præ.*;

Winkler, *de diff. inter test. null. et inoff.* 5, 6, 7, § ult. p. 38, gives ten causes of difference, but the treatise is unfinished.

A. By the old law there was a difference between the children, parents, and brothers and sisters of the testator. Parents and brothers and sisters would be passed over, but children not without a distinction.

The old law. Difference between parents and children, and brothers and sisters; between father and mother;

B. As regarded the father and mother, the former could not pass over the children without a difference, while the mother and maternal ascendants could.¹

C. The *sui*, or such children as were *sub patria potestate* on the father's death, could not be passed over, but the *emancipati* could.

between the *sui* and emancipati;

D. An emancipated child of the body, if passed over or not duly (*rité*) disinherited, could petition for *B. P. c. T.*, not so an emancipated adopted child.

between emancipated child of the body and adopted child;

E. Sons must be instituted or disinherited by name, but daughters could be passed over.

between sons, daughters, and grandsons;

F. Grandsons could be passed over like daughters.

G. Children in existence when the testament was made, can impugn it as *nullum* if passed over in a manner not recognised by law. Posthumous children rendered the testament *ruptum*, or could petition for the *B. P. c. T.*

between existing children and posthumi.

§ 1307.

The later Roman law wholly repeals the differences, F and G, between sons and daughters, children and grandchildren, A being partially repealed by Nov. 115.

Modification of the later law.

Parents can be passed over, but, as is the case with children, a valid cause must be assigned.

The second difference, B, between father and mother, is also partially repealed by the 115th Nov. The mother may pass over the children without formally disinheriting them, but she must assign one of the fourteen causes required for the disheredation of children.

But it may be doubted if it be a preterition when the party is named,—if not named he must be at least circumstantially described; hence it may be asserted that a mother must in fact disinherit her children by name.

C & D. Some jurists are of opinion that the Novellæ make no distinction between *sui* and *non sui*,—hence, that the *querela inofficiosi* is competent to both alike, and that the latter need have recourse to the *B. P. c. T.* But others are of opinion that the difference is not entirely abolished,—and only in this, that both may require a valid cause for their disheredation to be assigned.

One distinction, however, remains,—viz., that the *sui* can impugn a testament, according to the Civil law, when passed

¹ What applies to the mother applies equally to the maternal grandfather. *Matre et avo materno liberi jure civili pro extraneis sunt.*—I. 2, 19, § 3.

over or not duly disinherited, or where no legally valid reason therefor is assigned.

The non sui.

The non sui, on the other hand, must in all cases seek the *B. P. c. T.* Upon these points Höpfner¹ thinks, probably correctly, that the non sui require no *B. P. c. T.* when they impeach a testament for non-observance of the provisions of the 115th Novella, Justinian having made therein no distinction between sui and non sui, but that it is a moot point whether the non sui must in other cases seek relief in the *B. P. c. T.*, or whether, like the sui, they can institute the *querelæ nullitatis* and *inofficiosi*.

Father and male paternal ascendants.

The later law does not permit the father and male paternal ascendants to pass over the children of their bodies, and grandchildren being under their power and born at the time of the making of the will; and, if they do so, the testament is *nullum*.

When a preterition

If they disinherit such, but not in conformity with the form prescribed—that is to say, not *rité*, or duly, inasmuch as such exheredation, in which the formalities prescribed in the old laws² are not observed, is to be considered as a preterition, the testament is as regards its whole contents *nullum*.³

must follow the 115 Nov.

If the exheredation be *rité*, duly, made, but the provisions of the 115th Novella be not observed—that is to say, there is no cause adduced, or, if adduced, is not among the fourteen recognised by law, the institution of the heir is of none effect, *testamentum corrumpit quoad institutionem*, and a *querela nullitatis ex jure novo ex Novella 115* is maintainable.

Offences must be stated.

Nor will it avail the heir to assert that the person dishereditated had committed one of the fourteen offences involving the penalty of exheredation, for if so it should have been stated.⁴

But the testament is good, except the heir's institution, and the legacies, &c. stand, whereas by the old law the whole testament would have been *nullum*.

Truth of reason of exheredation disputed.

If one of the fourteen reasons be adduced, and its truth disputed by the party dishereditated, he must commence the *querela inofficiosi* in order to put the heir to the proof of its truth;⁵ if he fail therein, the institution is upset as inofficious,—but if he succeed, it stands, and the testament is confirmed.

¹ Com. § 527; ed. 8.

² *i. e.* That which obtained before the promulgation of Nov. 115.

³ Harprecht, ad l. 2, 13, § 5, n. 6; Donell. Duaren. Hotomann, Fachineus, etc. assert that the institution alone is affected when a father passes his child over in silence, but assert generally that a testament is invalid by reason of the preterition or dishereditation of the children; Hunn. quast. sel. 2, 20; Cocceii, in jur. contr. ht. qu. 4; Pufendorf, T. 4, obs. 76, § 16,

seq.; Koch, diss. de test. per mat. vel null. vel rupt. Gess. 1773, § 4. *Si autem hæc observat non fuerint* are the words in issue. Did Justinian intend wholly to abolish the old form, or only modify it? Vinnius thinks the latter; vide et Höpfner, l. c. § 519, n. 1.

⁴ Harprecht, l. c. n. 92; Menz. de test. p. 840.

⁵ A strict proof is not required.—Leyser, sp. 457, med. 5.

§ 1308.

If a father of paternal ascendent neither institute nor disheredites, nor *duly* exheredates (for that amounts to preterition) the issue of body, or grandchildren not under his power *non sui*, they may petition under the edict for the *B. P. c. T.*

On exheredation of the non sui by a father as paternal ascendent.

If they be *rité* exheredated, they must first seek a qualified *B. P.* termed *litis ordinandæ gratia*, and, having obtained this, institute the *querela inofficiosi*.

§ 1309.

The foregoing is correct of children already born when the testament is made, and is applicable to the *posthumus*, with the only difference that if the *suus* was extant at the time of the making of the testament, the testament is *nullum*,—whereas, if a *posthumus suus* be passed over, it is *ruptum*.

The case of posthumous children.

In the case of posthumous children, the difference between sons, daughters, and grandchildren, is not so defined as is the case of children already born. If a *filia posthuma* or *filius posthumus* be passed over, the testament is *ruptum*.

The difference in the form of the exheredation of male and female posthumi was, that the former must be exheredated *nominatim*, the latter *inter cæteros*, with a legacy *ne viderentur præteritæ esse per oblivionem*.¹

It is a common vulgar supposition of the lower orders in England that the heir-at-law cannot be disinherited without a legacy,—*vulgo*, “the eldest son must be cut off with a shilling.” The above shows that the prejudices of the vulgar always have a foundation, and that such foundation is usually based on a misconceived view resulting in an absurdity.

Origin of the vulgar impression in England that an heir must be disinherited with a legacy.

The next question is,—do the valid reasons for exheredation apply to *posthumi*, for how can a valid cause be assigned against one not yet born? The explanation lies in a fiction. The grandchildren under power of the father are to be considered his *posthumi*. Now the *avus* may say,—*Filius meus hæres esto, si me vivo moriatur, liberi sui hæredes sunt, excepto primogenito quia me feriit, exhæres esto*.

In how far the valid reasons apply to posthumi.

Secondly, children acquired under paternal power by legitimation, after the making of the testament, are *posthumi*: such a daughter may be exheredated for having led a lewd life.

§ 1310.

If children be *perfecté* adopted or arrogated, and are under power, they are in exactly the same category as issue of the body; if minors, they may, though exheredated, claim the *quarta Divi Pii* at least, if they be so without just cause; but if emancipated,

The case of adoptive children being disinherited by the father.

¹ Vinn. ad I. 2, 18, § 1, n. 4, et Hein. ad id.

they may be passed over. Those *imperfecté* adopted only inherit *ab intestato*, and can, consequently, be pretermitted in a testament.

By the mother.

The mother and maternal ascendants may exclude at pleasure adoptive children; but it will be remembered that women sometimes obtained the right of adoption by rescript, these can demand no *legitima*, for the *imperfecté adoptatus* cannot claim it from the father, *à fortiori* not from the mother,¹ as a matter of course, a child adopted by the father has no claim of *legitima* on the mother.

§ 1311.

Rule to be observed by the mother and maternal ascendants.

The mother and maternal ascendants may exheredate or pretermitt the issue of their bodies; hence the *querela nullitatis ex jure antiquo* will not lie, nor will the prætor grant *B. P. c. T.*; the *querela inofficiosi*, however, is available. The *querela nullitatis ex Novella 115* applies, if no legally valid cause be stated, and *corrui testamentum quoad institutionem*, nor is the heir allowed to prove such a cause to exist in fact, although not stated.² But if such cause be stated, the person exheredated must have recourse to the *querela inofficiosi*.

If the mother or maternal ascendants make a will, and afterwards have children or grandchildren who are not instituted, the will is not *ruptum*; but a *querela nullitatis juris novi*, or a *querela inofficiosi*, may be instituted.

§ 1312.

The case of parents exheredated by children.

When parents are exheredated by children, one of the eight legally valid reasons must be set out in the will; but if this has not been done, or if the children have given none such, or one not within the eight aforesaid, *corrui testamentum quoad institutionem*, on a *querela nullitatis* being instituted by them; nor will it avail the instituted heir, if he succede in showing that the parents have been guilty of one of the eight legal causes, so that be not set out; if, on the other hand, one of such eight be set out, and the parent exheredated assert its falsity, he must do so by a *querela inofficiosi*, and the *onus probandi veritatis* lies on the heir instituted; if he succede the testament is confirmed, if he fail the institution of the heir is upset. This is clear by the *Novella 115*, not so by the old law.³

§ 1313.

The case of brothers and sisters exheredating each other.

If brothers and sisters be exheredated or passed over, and a *turpis persona* instituted, they have, whether a cause of exclusion be set out in the testament or not, no other remedy than the

¹ Glück. Th. 1, § 37, h. 38; Gloss. ad P. inoff. test. 29, § 3; Höpfner, l. c. § 532, n. 3; Noodt. ad tit. inoff. test. p. m. 159.

² Contra, Haber, h. t. n. 14.

³ P. 5, 2, 3, § 1; C. 3, 28, 28; sed vid. Nov. Majoriani viii. (Cod. Th. Ritter

Ed. Append. S. 156). Si vero matri contra religionem sanguinis propositumque pietatis externus hæres insidiatorque subreperit quidquid ab ea non justis causis extantibus quas sine dubio probaturus est qui videtur filiis anteferri donatum fuerit vel relictum, id totam ab iisdem filiis vindicatur.

querela inofficiosi; upon which the question is raised of whether the exheredated sister has so conducted herself towards the testator as to deserve exheredation, — if so, the testament is confirmed; if not, upset. It is disputed upon whom the burthen of proof falls: it would appear that the plaintiff must prove generally that he or she behaved as a good brother or sister, but he need not prove his innocence of the charge,¹ the proof of which is for the defendant. Others say, the plaintiff must also prove this, as Justinian did not alter the old law as to brothers and sisters;² but the former appears the more reasonable.

§ 1314.

Before considering how a will may be set aside for informality, it will be well to examine how a testament, otherwise good may be invalidated *rescindatur*, on a principle of equity by the inquiry or plaint (for it was not, strictly speaking, to be called an action), termed *querela inofficiosi testamenti*.

The principle of the *querela inofficiosi*.

This is a remedy given to persons whom the testator has deprived of their legal share, either by exheredation or by preterition, upon the fictitious presumption that the testator who would thus deprive persons nearly related to him of their due share must be of unsound mind.³ This suit may be instituted by children, parents, and brothers and sisters, in cases where a *turpis persona* is preferred to them, although they may have been disinherited or passed over in the usual acknowledged form; but where the reason is non proven, the inquiry is directed against the heir, and if the plaintiff recover judgment the will is upset, and he succeeds as heir-at-law, and this is equally the case if the cause assigned be false, or non proven; and here it may be remarked that the reason may be a legal and good cause, yet false as to fact, thus the son may be falsely stated to have struck the father.

When and by whom institutable.

It is instituted against the heir who has been instituted in the place of him who is disinherited, and against such person the *querela inoff. test.* lies, praying that the will may be rescinded to the extent to which the plaintiff is damnified, and that he may be admitted to the *B. P. s. T.*; the entire testament, however, is not so destroyed as to render the testator intestate;⁴ in cases where, of two heirs with equal claims, one is disinherited and the other not, the *querela* invalidates the testament only as far as the plaintiff is concerned.

Against whom institutable.

§ 1315.

But here a very important question arises: if the fiction upon which the testament is destroyed be that of insanity, it follows that the whole must be void, not a certain clause of it; to meet

The operation of the *querela inofficiosi*.

¹ C. 3, 28, 28, arg.

² Hommel, diss. de diff. inter querel. inoff. quæ parent. ad lib. et quæ frat. compet.

³ I. 2, 18, pr.

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⁴ I. C. Koch, de quatinus test. per. quer. inoff. test. reddatur intestatus, P. 5, 2, 8, 8; P. 5, 2, 19; Nov. 115, c. 3, & c. 4, ad fin.

this, Justinian ruled in the 115th Novella, with respect to parents and children, that the institution of the heir should only be affected, not the whole will; but what is the law for brothers and sisters, here the old law then remains in force? Some have written in favor of one, some of the other view.¹

Querela inoff.
test. reluctantly
adopted.

Inasmuch as this form of inquiry called the sanity of the testator into question, without however proving anything, it was reluctantly adopted; hence, where the end could be obtained by other means, as by *actio nullitatis, rupti irriti*, or *bonorum possessio contra tabulas*, such were preferred. To act otherwise would also have been, under the new law, absurd, as this latter course upset the whole testament; whereas, the *querela inoff. test.*, the heir's institution alone.²

Was not com-
petent to heirs
of heirs.

This action could not be commenced by the heirs of the disinherited party, when this latter had not juridically or otherwise declared that he intended to institute the suit, to which Justinian introduced the exception, in the case of a disinherited child dying during the period of deliberation of the instituted heir, that his descendants can institute the *querela*, despite the silence of the deceased on the subject.

Limited to five
years.

The action is limited to five years; whereas other suits, relative to inheritances, are not barred till after a lapse of thirty years.³

Penalty of
failure.

There is a curious penalty in force respecting legatees who institute this suit without bringing it to a successful issue; they lose their legacies as a punishment for having accused the testator wrongfully of unsoundness of mind,—this is, indeed, a fact founded on fiction, which continued even after the fiction had ceased, the new law, however, rendered it unnecessary; and if we admit the principle of the law ceasing with the cause⁴ to apply here, all the other provisions which certainly remained in force under the new law would be annihilated.⁵

Not maintain-
able if the ex-
heredation was
founded on a
good motive.

This *querela* could not be instituted when the testator had disinherited from a good motive (*bonâ mente*), as when a father disinherited his imbecile or extravagant son and instituted his children, or when he disinherited his infant son ordaining the heir to deliver the inheritance to him on his puberty, or when the son is in debt and the father foresees that the creditors will absorb the whole property.⁶

Suit barred by
silence.

Whoso by silence or consent shall have acknowledged the will of the testator is barred from this suit; such an act as accepting a legacy will have this effect, for the validity of the will, and consequently the sanity of the testator, is thereby acknowledged.

¹ Pro Hommel, diss. cit. § 10; contra, Struv. ex. 10, th. 22; Voet. com. tit. de inoff. test. 1213; Cocceii, jur. controuv. cod. tit. qu. 11.

² P. 5, 2, 8, § 12; Püttm. adv. lib. 1, cap. 6.

³ Püttmann, opusc. p. 27; Voelker, diss.

trans. quer. inoff. test. ad hæred; P. 5, 2, 8, § 17 & 9.

⁴ C. 3, 28, 34, et 36, § 2.

⁵ Sed vide Koch, specim. compend. Pand. med. 5.

⁶ Leyer, sp. 358, 2; Pufendorf, tom. 1, obs. 192; Boehmer, jur. controuv. p. 417; Ayer, diss. cit. 28.

§ 1316.

Testaments may be avoided in various ways, and are then termed *nulla, injusta, destituta, rupta, irrita*, or *recissa*; even the Roman lawyers, however, occasionally confuse these terms.¹

A testament is said to be *nullum* when some vice exists in its internal requirements arising from the will or personalty of the testator, thence termed defect; or that of the heir, in which case the testament is correctly said to be *nullum in specie*; for example,² when any person who must be instituted or disinherited under penalty of nullity is not so instituted or disinherited or *rité* disinherited, or when a person incapable of inheritance is instituted, as an apostate or an *illicitum collegium*, when the testator had no power of testation as in case of a *prodigus*, when the testator was forced or fraudulently induced to make the will,³ or when the legacy is *captatoria* or dependent on a reciprocal condition between two parties.

Injustum, or illegal, on the other hand, applies to a want of some external solemnity necessary to the validity of a will, as from a want of the due number of witnesses, their formal *rogatio*, or *unitas actus*, &c.; this is, however, a comparatively modern distinction, as the old Roman jurists called all wills void, *ab initio, injusta, non facta, imperfecta, non jure civili facta, inutilia, nullius momenti*, whether the vice be internal or external.

With a *testamentum nullum*, all legacies and trusts fall to the ground, nor can any subsequent occurrence remedy the defect, for though a son, who should have been *rité exheredatus*, die before the testator, still the will is *nullum*;⁴ it must, however, be premised that the codicillary clause in some measure remedies the defect in a *testamentum injustum*,⁵ or the prætor may do so when a *filius præteritus* repudiates the inheritance.

Void testaments are either *nulla, injusta, destituta, rupta, irrita*, or *recissa*.

Nulla, by reason of a vice in the internal solemnities.

Injusta, by reason of a vice in the external solemnities.

Effect.

§ 1317.

A testament is *destitutum* or *desertum* when the heir will not or cannot assume the inheritance, for an heir may die before the inheritance vests in him, and thus be prevented from transmitting it to his posthumous or living heirs; may have become incapable of accepting since the will was made, or the conditions of the institutions may not have been fulfilled; in such cases, the heirs-at-law step in as such unfettered by legacies and trusts.⁶

Destituta, for want of an heir capable of taking.

¹ P. 28, 3, 1; P. 37, 4, 20; P. 40, 4, 50; P. 28, 4, 3, in fin; P. 29, 1, 15, § 1.

² *Scrip. gentilis tr. de erroribus test. Argentor.* 1669, 8.

³ In this case, if the legacies were made freely, Pufendorf, t. 2, obs. 10, § 4, seq., thinks they are good, and the heir's institution bad.—Müller ad Leyser, obs. 578.

⁴ I. 2, 17, pr.; P. 28, 2, 7.

⁵ Vid. § 1334, h. op.

⁶ Lauterbach, *diss. de test. destit. th.* 27, seq.; Stryk, *de success. ab intest. diss.* 1, cap. 1, th. 30; Zipernick, *diss. cit.* § 12, seq.; Seger, *diss. de vi et fac. claus. cod. test. dist.*

§ 1318.

Rupta, by the birth of a posthumous child or by a subsequent will.

A testament may be cancelled or *ruptum* in two ways, either by the subsequent birth of a person who must by law be instituted or disinherited,¹ or by the making of a subsequent will. The first case may occur on the birth of a posthumous child, and, indeed, this is the only case admitted by the Code and Pandects (*posthumi sui hæredes*) on the birth of a child not mentioned in the will.

A mother could have a posthumous child

A mother may in a certain legal sense (although the term may appear absurd according to its physical signification)² have a *posthumus*, quoad the testament, as if she bear children after the making of her will, or if one of her children die and the others survive, in such case the testament is not *ruptum*, but *nullum* or *inofficiosum* according to the 115th Novella.

by birth of necessary heirs after will made.

The *hæredes necessarij*, born to a testator after the making of the will, may be descendants, *posthumi*, or ascendants,—for instance, the testator's mother was living when he instituted his son and a stranger in blood, the son dies before the father, and the grandmother administers as necessary heiress, and can impugn the will.³

Strictly speaking, *posthumi sui hæredes* alone can render a testament ruptum; by the law of the Pandects and Codex,⁴ mothers must seek relief in the *B. P. c. T.* or in the *Q. I. T.*⁵

Remedies against a will by Novella 115.

The remedies, by the 115th Novella, against a will in which the *hæredes necessarij* are not duly considered, are in dispute; but, for consistency's sake, greater rights at least cannot be granted to necessary heirs who come in after the making of the will, than would have accrued to them if they had been in existence at the period at which it was executed, and at which time they had been improperly excluded from the inheritance.⁶

§ 1319.

Avoidance of a will by arrogation.

Arrogation subsequent to execution, or when a descendent be adopted, for this must not be understood of the *adoptio minus plena*, as in that case the adoptive person has no claim otherwise than as heir-at-law: the legitimization of a natural child by marriage or rescript; or when a child, the death of whose father leaves them immediately in their grandfather's power, and who have been neither disinherited nor instituted.

§ 1320.

By the making of a subsequent will.

A subsequent testament renders the prior one *ruptum*. Such subsequent testament must of course be in due form, but it is not

¹ I. 2, 13, 1, § 2, 3; I. 2, 17, 1; P. 28, 2, 3; P. 28, 2, 17; C. 6, 29, 1.

² Physically, a woman can only have a posthumous child by the Cæsarian operation, vid. § 677, h. op. n. 8.

³ Stryk. caut. test. 24, § 8.

⁴ I. 2, 17, § 1; I. 2, 13, § 1, 2, 3; P. 28, 2, 3 & 17; C. 6, 29, 1.

⁵ Querela inofficiosi testamenti. These initial letters are used for the convenience of abbreviation.

⁶ Koch, cit. diss. § 34.

necessary to be stated that the former will is revoked if this second will become *destitutum* for want of the acceptance of the heir instituted, or his death before the testator, or *si deficit conditio de futuro* whereupon the heir is to found his right; hereupon the first testament is *ruptum*, and the second likewise,—the first *quia testamentum semel ruptum semper ruptum manet* by the fact of the existence of later and formal will, the second because its provisions cannot be complied with. As an example of this,—A makes his will, instituting an expected *posthumus*, he loses this expectation, and makes a second will without mention of a *posthumus*; he now dies, but yet the *posthumus* is born, thus the second will is *ruptum*, for the *posthumus* was not instituted, and the first is not revived.

Neither is *clausula capatoria* or *derogatoria in futuro* in a will, declaring any subsequent will to be void, of effect, though some are of opinion, but without good reason, that in such case the testator in any later will must expressly abrogate such clause.¹

§ 1321.

A later will must be formal, for, if not so, it has naturally not the effect of revoking the former, being in itself a nullity.

Before the time of Pertinax, a doubt appears to have existed whether the second testament must be valid, if the first became *ruptum*; to remove it, the Sctum. intituled “ne alias tabulæ priore jure factæ irritæ fiant, nisi sequentes jure ordinatæ et perfectæ fuerint,”² appears to have been made. If the intestate heirs be excluded in the first, but instituted in the second, the last is valid, although five witnesses only have attested the instrument. If the second will be made in a privileged form recognised by law, it will revoke the first,³ for the words of Pertinax only apply where the second will was informal. An exception, however, obtains as to the *testamenta parentum inter liberos*, which can only be revoked in the usual form applicable to wills generally.⁴

Now two cases may occur,—one by a *conditio de præsentis* or *de præterito*, and another by a *conditio de futuro*. A makes a will in 1840, and in 1847 makes another, instituting B his heir if he should have then done a certain lawful act; on his death, it appears that in 1847 B had not even then performed the prescribed condition,—in this case the first will stands good, for the will was bad *ab initio*.

As regards the *conditio de futuro* it is otherwise. Thus, as before, B is my heir when he shall have performed a certain act; if B do not perform it, the second will is *destitutum*, and the first *ruptum*,⁵

When the second will was valid on the first becoming *ruptum*.

Modifications of the above. *Conditio de præsentis* or *de præterito*.

Conditio de futuro.

¹ Vid. § 263, p. 296, h. op. in fin.

² I. 2, 17, § 7; de quo in extenso A. F. Schott, com. ad orat. Pertinacis de test. post. imperf. prius perfect. baud rump. in opusc. p. 41, seq.

³ P. 29, 1, 36, § 4; P. 28, 3, 2.

⁴ Nov. 107, 2; this is controverted, Voet. ad P. 28, 3, 3; Pregel (Koch) de test. rupt. § 7.

⁵ P. 28, 3, 16; Arch. Lud. Carl. Schmidt, diss. de test. priore post. derogante, Jen. 1755.

on account of the mere existence of a second, consequently the testator dies intestate.

Modification.

Sometimes a first testament may be treated as a codicil, or *fidei commissum*,—A having made a will in favour of C, makes a second will, instituting B heir to a certain thing, and declaring the first will shall stand good; B then serves himself as heir, and, keeping back what was left him, delivers the residue to C, the heir of the first testament,¹ as his trustee.

When two testaments co-exist of like date.

Now, when two testaments bearing a like date were found, neither were valid, but the prætor gave the *bonorum possessionem secundum tabulas*, according to Ulpian,² which may appear a contradiction, because *paganus cum duobus testamentis decedere nequit*, but in such case the prætor considered them as *duos codices simul signatos*, or, as Ulpian says, *pro unis tabulis*, or as *plures tabulæ ejusdem testamenti*, and this rule is applicable by liberal interpretation to the case where, of two testaments, neither or one only is dated.³

§ 1322.

Revocation of a testament before three witnesses, or judicially, after ten years lapse, according to Honorius.

The doctrine of Honorius, of the limitation of testaments, is so striking, that it deserves some passing explanation.

Modification by Justinian.

The emperor Honorius, about the beginning of the fifth century, decreed that a testament should lose its effect in ten years from its execution, without any act of revocation by the testator, upon the presumption that a testator changes (or ought to change) his mind periodically every ten years,⁴ with the chance of circumstance and age, or perhaps with a view to favor intestate heirs and check rash legacies. Justinian,⁵ being a friend of finality, except where his own acts were affected, modified this too practical policy of progress by a qualification, viz., that the lapse of ten years should not alone suffice to invalidate a will, but that if *after such lapse* the testator declared *judicially*, or *before three witnesses at least*, that he revoked his will, it should thereupon be invalid.⁷ *Sin autem testator tantummodo dixerit, non voluisse prius stare testamentum vel aliis verbis utendo contrariam aperuerit voluntatem, et hoc per testes idoneos, non minus tribus, vel acta manifestaverit et decennium fuerit emensum: tunc irritum est testamentum tam ex contrariâ voluntate quam ex cursu temporali.* Thus,—

¹ P. 28, 3, 12, § 3.

² P. 37, 11, 1, 6.

³ Mollenbec, diss. de duobus, test. simul validis, 3, 6; Phil. Wasmuth, diss. de duo. test. diver. temp. et sine die et consule sig. 11, et seq.; Stryk. de succ. ab intest. diss. 9, 4.

⁴ C. Th. de test. et cod. 6.

⁵ I. Gothofr. ad dist. leg. T. 1, p. 368; vero possim tamen, etc., Cannegieter, obs. I. R. 1, 6.

⁶ C. 6, 23, 27.

⁷ Merenda, controuv. 3, 44; Faber, de error. prag. dicad. 39, qu. 6; Vinn. ad I. 2, 17, § 7, n. 1, 2; Bachov. ad Treutler, vol. ii. disp. 10, th. 7, tit. B.; Struv. ex. 32, th. 42; Stryk. de caut. test. 24, § 36; Lauterbach, coll. th. pr. tit. de injust. rupt. irrit. § 13; Cocceii, controuv. ibd. qu. 9; Bardili, diss. de revoc. ult. vol. cap. 2, § 15; H. Cannegieter, l. c. 5; Heister, diss. an et quat. test. parent. viter lib. aliud test. anter. rump. Hal. 1779, c. 1, § 4, seq.

A makes his will in 1840, in 1850 he annuls it before three or more witnesses, and dies in 1851, his testament is *irritum*.

Notwithstanding the clearness of this passage, its meaning has been disputed, some asserting¹ the revocation may take place directly the testament is made, *after which* the expiration of ten years must be awaited,—others, that, assuming the above for their ground, seven witnesses will operate *immediate* revocation, and supersede the necessity of waiting ten years. It is unnecessary to add that these views are opposed to the obvious spirit of the laws both of Honorius and Justinian.

Various interpretations of this law.

Now, if the testament were in writing, the testator has two obvious ways of annihilating it, by cancelling or destroying the tablets, or by making another. This law, as applied to the first case, may have been introduced for the sake of more easy proof of the fact of destruction, and this appears the more probable as a judicial revocation is given as an alternative, or it may be intended to provide for the case of a testament being lost or mislaid, which is a fair supposition after ten years have elapsed. But the most probable presumption is perhaps, although the law speaks generally, that it was intended to apply to nuncupative wills only, and to give the testator a *locus penitentiae* after a lapse of ten years, and permit him in this simple negative declaration to pass the inheritance to his intestate heirs; three witnesses being substituted, in fact, for seven. This example shows that there was little to choose as to obscurity between imperial laws and imperial Acts of Parliament, and that the *res judicatae* and common law, as settled by decisions, are preferable to both.²

Author's interpretation.

§ 1323.

Any act by which revocation is implied, as burning, cutting, tearing, cancelling, or otherwise destroying a testament, will make it *ruptum*, but the testator must himself do the act, or authorize another in his behoof, and, if there be many copies, all must be so destroyed. The proof of authorization³ to another to cancel or “break” his testament for him, is of the greatest importance, and its admission or rejection depends in a great measure on the custody of the document, for if the testament so cancelled be found in the testator's own custody, it is presumable that he has

A testament may be *ruptum* by certain implied intentions.

Proof depends on the custody of the instrument.

¹ I. Cti. Marb. T. 1, consil. 34, n. 48, p. 514; Mantica, de conj. ult. vol. lib. 2, tit. 15, n. 19; Püttmann, interp. et obs. cap. 27; Schoti, disq. cit. cap. 9, in opusc. cap. 80; Greve, diss. de mut. et revoc. test. tam quoad modum quam quoad effectum, Goett. 1789, § 9; Hannsen, diss. (sub præ. Gebaueri) de test. accidente decennii lapsu revocatione, Goett. 1756, § 7; Gentilia, tr. de error. test. cap. 5.

² As this law must be construed with

that of Honorius, the author has here ventured to disagree with all the authorities, even Höpfner, l. c. § 517, whose view comes nearest his own, viz. that a will may be made in 1770, revoked in 1775, and become *irritum* in 1780.—de Colquhoun.

³ Lauterbach, coll. tit. de injust. rupt. irr. § 14, seq.; I. H. Boehmer, diss. de scrip. non legib. c. 3, ex ad Pan. tom. 4, p. 315; Westenberg in D. Marco, diss. 40; Pufendorf, tom. 1, obs. 137.

himself broken it, or caused it to be broken; the contrary presumption obtains if the testament so cancelled be found in the possession of another party.

A testament may be *ruptum* in part or in whole.

As a testament may be *ruptum* as to a part or as to the whole, it must be observed whether a part be cancelled which goes to affect the validity of the whole will. Thus, if the signatures of the testator and of his witnesses be struck out, or the heir's institution clause be cancelled, the whole testament is *ruptum*; in the latter case, however, the legatees could demand their legacies, because it might be proved as a codicil, but if the name of the co-heir or legatee be crossed out they lose their respective claims.

Destruction of the written memorandum of a nuncupative testament does not affect it.

Now, if a testator make his will nuncupatively, and subsequently reduce it to writing, *pro memoriâ*, the tearing¹ the draft does not affect the testament, being merely *ancillary* to his will declared by word of mouth, the revocation of which must be in like due solemn form, and cannot be implied by an act which after all may be accidental; nevertheless, the question has been elaborately argued.²

§ 1324.

Testamentum irritum.

A testament becomes *irritum* if the testator forfeit his civil rights by either of the two chief *capitis diminutiones*, viz., *maxima* or *media*, for it is not sufficient that the testator have the necessary *status civilis* merely at the time he makes his will, he must continue to have it till his death; this appears in contradiction to the principle, that a will valid in the beginning remains always valid, but vicious in origin never can become good, but in fact, this maxim is not and need not be infringed; the testament itself remains good, but has become of none effect, for so soon as the testator loses his civil rights by the means above stated, his property passes away from him, be it by confiscation to the treasury, or by its merging in another as in the master, when the testator becomes a slave, &c., hence there is nothing, in fact, for the testamentary heir to inherit; Vinnius's explanation is anything but satisfactory,³ and is, moreover, erroneous.

Testamentum recisum.

Lastly, a testament is *recisum* in case of a *querela inofficiosi testamenti* having been decided against the validity of the will.

§ 1325.

Summary of the foregoing.

From the foregoing it may be collected shortly:—

That a *testamentum* is *nullum* when the vice consists in an internal error in point of law, and in such case it is void, *ab initio*. That it is—

¹ Vinn. ad § 2, l. 2, 17, n. 3; Hofacker, prin. jur. civ. Rom. Germ. § 1270, 1271, 1354.

² Westphal. de test. § 919; Pufendorf, c. l. I. 137-138.

³ Vinn. ad § 1, I. quibus non est princip. n. 3.

Destitutum or *desertum* when from some cause the heir does not present himself. That it is

Ruptum by the *agnatio* or *quasi agnatio* of the *suus hæres* ;

By a change in the intention of the testator ;

By the testator's destroying it ;

By his superseding it by a later one.

That it is *Irritum*

By a change in the civil state of the testator.

That it is

Recissum by judgment of the court.

It now remains to be seen if and how any of these defects can be remedied, and if remediable, by what means.

§ 1326.

These means of remedy are twofold, either in equity or in law.

In equity, by the causing the bequests of a *testamentum ruptum* to be carried out. In law, by the revival of a testament in operation upon some strict legal reason. Revival in equity.

Although a *testamentum ruptum* is invalid with all its provisions,¹ yet the prætor sometimes gave it execution by the *bonorum possessio secundum tabulas*, in cases where the vitiating circumstance ceases in the testator's lifetime,—as, for instance, where a posthumous child whose birth had vitiated the testament dies before the father, or where the testator has destroyed a subsequent will under the supposition that the first would be revived.²

The Civil law revives a *testamentum irritum* by the *jus postliminii* acting upon the same principle, but with an equitable extension ; the prætor considered a testament rendered *irritum* by the loss of civil rights to be revived by granting the *bonorum possessio*, *s. t.* if the testator regained his former rights before his death, and died a *civis* and *pater familias*. Revival at law.

Whosoever is arrogated vitiates his will made before arrogation impliedly, for he consents to the arrogation ; hence, to revive such testament after emancipation, he must declare his intention in that behalf, and this he is allowed to do.³

§ 1327.

A *codicillus*, or a little book in its classical signification, implies a note addressed to a person residing in the same place as the writer, *epistolæ ad præsentem missi*, in which sense it is often used by Cicero.⁴ Whereas *epistolæ* from the Greek, ἐπιστολῶ ἐπιστολῇ, signified communications in writing, *inter absentes*, or between those living in two different provinces, and agrees with the English word, letters. Seneca⁵ has the two words in juxtaposition, *video te*,

¹ C. 6, 29, 1 ; P. 28, 3, 17 ; compare Nov. 115 ; Carpazov, p. 3, const. 9, def. 4 & 5.

² Stryk. de succ. ab intest. diss. 9, c. 4, § 32.

³ Vinn. n. 4, ad l. 2, 17, 6.

⁴ Epist. ad Div. 4, 12—6, 18, ad Alt. 12, 8, ad Q. Frat. 2, 10.

⁵ Epist. 55, in fin.

Origin of codicills.

Were merely directory.

Cause of their introduction.

No legal difference between *epistolæ* and *codicilli*.

How first acknowledged to be legal. Lentulus's *codicill*.

mi Lucili, quum maxime audio: adeo tecum sum, ut dubitem an incipiam non epistolas, sed codicillos tibi scribere. In like manner, we are apt to apply the term *notes* to communications addressed to those residing in the same town, but call them letters when destined for the country. Hence *codicillus* was a memorandum to the heir respecting acts to be done after the testator's death; it is presumable that these notes were in use from very ancient times, and were merely *directory*, without possessing or being intended to have legal validity; it has been seen that testaments in their original form were exceedingly terse. *Caius hæres esto, filii mei exhæredes sunt*, and the like, and it is therefore not probable that formal wills would be encumbered by *minutiæ*, such as directions respecting the funeral and the like; it is probable that they were made at the last moment, and that above all, the solemn execution or attestation of them was carefully avoided, lest they should be sufficiently formal to supersede the wills; it may then be taken that they were originally merely notes addressed to the testamentary or legal heir requesting him to do certain acts, which he might do or leave undone as he thought fit;¹ nor is it improbable that trusts which originally were precatory, and whose execution could on that account not be legally insisted on, had their origin in these directory *codicills*.

We find them also termed *epistolæ ultimæ, epistolæ ultimæ voluntatis, epistolæ fidei commissariæ*.² It has been endeavoured to be proved, but not satisfactorily, that these had another force and meaning, but they are in fact merely more modern terms for this same thing.

§ 1328.

The origin of *codicills* is attributed to L. Lentulus, who was consul, A. U. C. 751, with M. Valerius Messalinus.³ Lentulus made a will at Rome, in which he named his daughter and the emperor Augustus his heirs; he then went to Africa as pro-consul, and made a *codicill*, in which some *fidei commissæ* were enjoined to the emperor, and legacies to the daughter; on his death, Augustus paid the *fidei commissæ*, and the daughter the legacies as directed; whereupon Augustus called the lawyers together and asked them, that inasmuch as up to that time the legal force of *codicills* had not been acknowledged, whether it were not advisable to confirm such decrees by a law? C. Trebatius Testa, who enjoyed a high reputation, was of the number, and concurred in the emperor's view, on the ground that sometimes Roman citizens might die on journeys where seven Roman citizens are not to be found, and can consequently make no testament; we do not,

¹ *Codicilli nihil aliud fuerunt quam epistolæ scriptæ ad hæredes de eo quod post mortem suam (sc. testatoris) scribentes ab hæreditibus fieri vellent.* Boehmer, diss.

de *codicill sine test. valid.* c. 1, § 3, 4, p. 5, 6.

² P. 30, (ii.) 41, § 2.

³ Reinesii Inscr. Cl. x. p. 597, n. 3.

however, learn that Augustus ever passed a law to this effect ; somewhat later, the renowned lawyer Labeo, whose sense of justice, we learn, was beyond all question,¹ made a codicill, from which time no one ever doubted the validity of codicills ; Justinian also refers to this circumstance.²

Labeo's codicill.

§ 1329.

Codicills were certainly at first void of all solemnities, being simply prefaced by the ordinary salutation used in common letters. *L. Titius heredibus primis et substitutis salutem.*³ Codicills, however, were not invariably addressed to the heirs, they were often directed to the trustees themselves ;⁴ but most elaborate forms may be seen, both in Greek and Latin, on reference to Brissolinus⁵ and Guido Pancirolus.⁶

Form of codicills.

The law of the Pandects require no witnesses to a codicill, and we have no means of ascertaining by what means their genuineness was proved ; probably by the handwriting, on the best circumstantial evidence which could be adduced. The emperor Constantine, or perhaps his son,⁷ first directed five or seven witnesses, which number in what cases we are ignorant of ; but probably seven in the case of intestate codicills, but in ancillary codicills five.⁸

Pandects require no witnesses to codicills ;

but required by Constantine.

In addition to this, Theodosius the younger directed that all codicills should be made in the presence of five witnesses, that an *unitas actus* should be observed, and that if the codicill be in writing the witnesses should sign it at the foot, *in omni autem ultimâ voluntate, excepto testamento, quinque testes, vel rogati vel qui fortuito venerint* in uno eodemque tempore *debent adhiberi sive in scriptis sive sine scriptura voluntas conficiatur ; testibus videlicet quando in scriptis voluntas componitur, subnotationem suam accommodantibus.*⁹

Ordonance of Theodosius as to the witnessing of codicills.

The Institutes require no formalities to be observed as to codicills.¹⁰ *Codicillos autem etiam plures quis facere potest et nullam solemnitatem ordinationis desiderant*, which ought to be followed ? The Institutes were confirmed A.D. 533 ; the second edition of the Codex A.D. 534. The law of the Codex,¹¹ which permits a *testamentum posterius imperfectum*, in which the intestate heirs are instituted if signed by five witnesses, to be good as a *voluntas ultima intestati*, is also to be looked upon as a decree of Theodosius.¹²

The Institutes require no witnesses.

Theodosius, the younger, it has been seen,¹³ fixed the number at five, which has since been adhered to ; these witnesses may be

How the codicill must be executed.

¹ A. Gell. N. A. 13, 12 & 375.

² I. 2, 25, pr.

³ P. 40, 5, 56 ; P. 30, iii. 37, § 2 & 3.

⁴ P. 30, ii. 75, pr.

⁵ De Formulâ, viii. p. 686, seq.

⁶ Thesaur. Varr. lect. i. 29.

⁷ Co. Th. 4, 4, 1.

⁸ Where a will did not exist, seven, or the same number as would have been re-

quired to a formal will ; where a will did exist, five for proof.

⁹ C. 6, 36, 8, § 3. This passage is not to be found in the C. Th., but it may have been corrupted by Alarick, through whom it has come to us, or has been taken by Trebonian from another law of Theodosius.

¹⁰ I. 2, 25, § 3.

¹¹ C. 6, 23, 21, § 3.

¹² Vid. Donius, tr. cit. cap. 1, § 1, seq.

¹³ C. 6, 36, 8, 3.

accidentally present, *quinque testes qui fortuito venerint*, nor need they be specially *rogati*; some think even a woman may witness a codicill, but this opinion is to be received with much suspicion,—certainly there are many obvious reasons against their admission as witnesses, and none sufficiently strong to render their capacity more than very doubtful; the witnesses must sign,¹ but are not required to seal; the signature of the maker of the codicill is not required to the document; lastly, as in a testament, there must be a *unitas actus*.

Nuncupative
codicills.

Codicills may be
confirmed or
not in the will.

Codicills may be either written or nuncupative,² although the word etymologically certainly implies a written document; this is, however, not the case, as Justinian speaks of *codicillis non scriptis*.

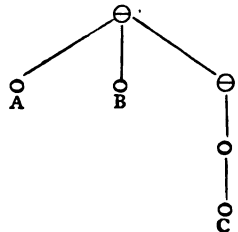
A codicill may or may not be confirmed by the testament; if it be so, some contend no witnesses are required,—such is at least the practice; this confirmation, Paulus³ tells us, may be in four different ways,—*aut in futurum, aut per fidei commissum, testamento facto, aut sine testamento*.

§ 1330.

The nature of a
codicill.

A codicill⁴ is, in fact, nothing more or less than the solemn will of one who dies testate or intestate *without the appointment of an heir*.⁵ A *testate* codicill is, when he who has made his codicill has, either before or afterwards, made his testament upon which that codicill depends, or to which it refers,—such are termed *codicilli testamentarii*, or *ad testamentum facti*; they are valid, though not confirmed in the testament,⁶ though, if the testament falls, the codicills fall with it. An *intestate* one is, when one leaves behind him only a codicill without a testament, hence termed *codicilli ab intestato*, wherein he gives legacies only to be paid by the heir-at-law, and not by any heir instituted by testament; thus a legacy can be left by codicill, a slave freed, a trust erected, a testamentary guardian given to a child, &c., because for the execution of these acts no heir need be named, nor is he bound by codicills, as was the case with the *fidei commissa* in more remote period, although they obtained a greater force at a later period.

Codicillus ab
intestato.



These two codicills are very different in their effect. Those *ab intestato* are of themselves perfect, and do not depend on the testament or aught else, but have a direct binding force on the intestate heir: thus,—

A makes a codicill, and burdens his brother and heir-at-law, B, with a legacy, but, B dying before A, C becomes the heir-at-law in his place, and must carry out the directions contained in the codicill.

¹ C. 6, 23, 21, § 3; *super signatio*, and all sealing is dispensed with, because an heir cannot be named in a codicill, and consequently there is nothing to conceal; hence

sub instead of *super* notatio, C. 6, 36, 8, § 3; vid. et § 1221, h. op.

² C. 6, 36, 8, § 3.

³ P. 29, 7, 8.

⁴ C. 6, 36, 7.

⁵ I. 2, 25, § 1, 3.

⁶ P. 29, 7, 3, § 2.

A codicillus testamentarius, on the other hand, stands or falls with the testament. Now these may be *testamento confirmati* or not so, and those confirmed may be so before or after they are made. An example of the first is,—

“I declare the codicills made before the testament valid, and to be considered as if incorporated therein;” or, as an example of the second,—

“I declare that the codicills which I may make after this testament shall be valid, and be looked upon as a part thereof.”

§ 1331.

Whoever can make a testament can also make codicills, and who cannot make a testament is equally disqualified from making a codicill. The chief difference between the two is, that a testament must contain the nomination of a direct heir,¹ but not so in a codicill, consequently no one can be directly substituted or disinherited, no nor even can any condition² be prescribed to an heir, for this is in fact an *ademptio conditionalis* excluding him on non-fulfilment of the condition. On the other hand, legacies and *fidei commissa*,³ even *commissa universalia*, can be directed, slaves freed, a testamentary guardian appointed; it can direct how much the heir ab intestato shall receive; and regulate those portions of the testamentary heirs not settled by the testament itself;⁴ but no gift (*donatio*) can be made by codicill, for such requires acceptance; nevertheless, if it be declared by any one in a codicill that he gives A B such a thing, though it cannot be supported as a gift, it may be so as a legacy or bequest in trust.⁵

Who can make a will can make a codicill. What it may contain.

§ 1332.

The law of codicills, confirmed or not by testament, differs in this,—that what is bequeathed in a confirmed codicill, *codicillis confirmatis*, is of as much force as if left in the will itself, inasmuch as it be not contrary to the nature of a codicill.

Codicills confirmed in testament, and not confirmed.

The chief difference between the two are as follows:—

Difference between them.

1. *Legata* could be left in confirmed codicills only; *fidei commissa* in unconfirmed codicills.

2. *Libertas* could be left directly in confirmed codicills only.

3. *Tutor testamentarius* could be appointed in confirmed codicills only, and would then not require the confirmation of the authority having jurisdiction in matters relating to guardianships.

Since Justinian assimilated *legata* and *fidei commissa*, legacies and freedom can be left in either, and the third alone remains.

A fourth difference is added by some, but as the laws of the

¹ P. 28, 5, 77.

² P. 35, 1, 10.

⁴ P. 10, 2, 39, § 1.

³ Vinn. ad § 3, de legat. n. 5, ad § 10, de fiduc. hæred. n. 2.

⁵ Zepper, tract de codicil. 7, 87, seq.

Codex and Institutes are in conflict on the subject of witnesses, this cannot be enumerated as a difference.¹

Difference between a codicill and a testament.

The difference between a codicill and a testament consists in this, that—

A testament requires many solemnities.²

A codicill scarcely any, except the subscription of five witnesses accidentally present at the same time.

A testament *must* contain the institution of an heir;³ a codicill *must not*.

No one can leave many testaments behind⁴ him; but he may leave many codicills, which may all be valid,⁵ except contradictory to each other, because by testament a *successor in omne jus quod defunctus habuerit* is named, and this can be granted at once; whereas, by codicill, particular legacies only are bequeathed.

§ 1333-

A codicill may be either *public* or *private*.

A codicill may be public, private or privileged.

Public are such as are made before the prince or public authority, and require no solemnities whatever,—the same rules being applicable to codicills so made as to testaments.⁶

A private codicill is either solemn, unsolemn, or privileged. Whoever can make a privileged testament can make a privileged codicill;⁷ thus, if a religious house be instituted in a testament, all solemnities are omitted; in like manner, if anything be left in a codicill to a religious house, solemnities are dispensed with.

Testaments, as between parents and children, are privileged from formalities, so also codicills under like circumstances.

A solemn codicill.

A solemn codicill, although it dispenses with the special rogation of the witnesses, appears to require five and their signatures when the codicill is in writing, also the *unitas actus*; but if it be nuncupative or oral, they must necessarily be called upon to attend to what is said, though they need not be expressly invited to come for that purpose. The seals of the witnesses are dispensed with, without which a testament would be informal. The signature of the maker can be dispensed with, and some are of opinion that when a codicill is confirmed in the testament it requires neither witnesses nor signature; and it must probably be understood that women are not good witnesses, for it must be presumed by witnesses are meant persons usually qualified to be witnesses, no deviation from the general rule being stated.⁸

Witnesses.

¹ § 1329, h. op.

² C. 6, 36, 8, § 3.

³ I. 2, 25, § 2.

⁴ I. 2, 25, § 2.

⁵ C. 6, 36, 3.

⁶ Vid. § 1228, h. op.

⁷ Vid. § 1227—1233, h. op.

⁸ Contra, Reinold, varior. cap. 5; Span-

genberg, com. de muliere ob testium solo. testimon. ferendi in cod. exparte, Goett. 1770; Walch, controuv. p. 338, ed. 3; pro Jenichen, de eff. nul. testim. in cod. in Leyser, med. ad Pand. vol. ii. p. 75, seq.; Müller ad Leyser, obs. 590; Westphal. Vinn. § 1916.

ness it may be correct to assert, that where there is a will in which all codicills are confirmed, none are required, because it becomes a part thereof; but where there is no will, then, as it becomes of itself a sort of privileged testament, and directs the intestate heir to do certain things, witnesses are necessary.¹ Still, it must be borne in mind, that the before-cited law of the Codex is general. *Semle* that this difficulty is met by considering confirmed codicills a part of the testament.

Lastly, in testaments, the heir cannot be a witness from his fictitious identity with the testator, or because he is witness in his own behalf. If the testament be considered in its old view of bargain and sale, can the legacy be so in a codicill? Höpfner² weighs the evidence, and decides in the negative; but, it would seem, without good grounds, for the legatee of a codicill is not the heir, or in the position of one. The heir-at-law is the heir, and if a legatee be a good witness in a testament, why not in a codicill? the doubt is diminished in the case of a confirmed codicill (if indeed such require witnesses at all).³

§ 1334.

A so-called codicillary clause is a paragraph or note appended to the will, to the effect that, "If this my testament be not valid as such, my desire is that it be taken as a codicill"; for though the law of testaments and codicills is distinct, yet, as has been already seen, an imperfect testament may often be supported as a codicill.⁴

The codicillary clause.

To the above clause, foreign notaries often add the following general tail piece:—"Inasmuch as this my testament, by reason of certain causes and imperfections, may not be effective in law as a solemn, complete last will or perfectly valid testament, it is nevertheless my will, that the same shall have force and validity as a nuncupative testament, codicill, trust, *donatio mortis causâ*, or in what way soever it may best be rendered valid in law."

This flourish is, however, supererogatory, for if it be good as a codicill, it is good as a trust; but as a gift in contemplation of death it can never be valid, for the acceptance is wanting; neither can it be a nuncupative testament, not having been declared before the witnesses to be such, or read over to them: this whole addition is, then, a mere piece of legal surplusage invented by indolent persons to save the trouble of reasoning, or by ignorant ones incapable of it.

§ 1335.

The simple codicillary clause has no effect to make a defective testament valid as a codicill.

Effect of the clausula codicillaria.

¹ P. 29, 7, 14, pr.; P. 29, 7, 2, § 2; P. obs. 558; P. 28, 6, 41, § 3; C. 6, 49, 15, 12, § 5.
Com. § 626; Müller ad Leyser,

² de Colquhoun.

³ P. 36, 8, 1; C. 29, 7, 1.

1. When the testament is valid as a testament ;
2. When made by persons under disabilities ;
3. When the *unitas actus* is wanting ;
4. When the witnesses do not amount to five ;
5. When they are women ;
6. When they have not signed it ;

But when these last five objections do not exist, the defective testament may be supported as a codicill, under the simple codicillary clause.

This clause's operation is to turn a testamentary heir into a trustee, *institutionem hæredis directi in institutionem hæredis fidei commissarii convertere* ; the testament is looked upon as directory to the heirs-at-law to assume administration, and deliver it to the testamentary heir, after deduction of the Trebellanian fourth.¹

Some will have it that the codicillary clause may always be understood in a testament ; but those who deny it appear to have the best of the argument, especially taking into consideration the above passages.²

§ 1336.

Testamentary
trusts and fidei
commissa.

There is no branch of the Roman law which has entered so largely or so usefully into the law of England, as that relating to *fidei commissa*, or trusts ; indeed, almost invariably where there is any property, some trust will be found connected with it for some purpose or other. In Germany, by making an use of land perpetual, the object of keeping landed property together, and in the same family, is more sufficiently attained than it can be by any other system ; it therefore becomes important to examine the Roman origin of *fidei commissa*.

The form in which a *fidei commissum* was erected has been already seen where bequests in trust, relating to single things, is treated of.³ Effectively, a trust was a mere evasion of the law by and in favour of persons devoid of the *testamenti factio*, or power of giving or taking under a will, such as *peregrini*,⁴ and may, in conjunction with codicills, be considered in principle as the final and largest imaginable extension of the right of testation ; that it is so in practice has been sufficiently demonstrated by the fact of no more liberal system having been since introduced, so that, after nearly nineteen centuries, we find the courts of

¹ P. 28, 6, 41, § 3 ; C. 6, 36, § 10.

² Carpozov, part. 3, c. 4 ; D. 38, et lib. 6, resp. 7 ; Zepper de cod. cap. 4, n. 138, seq. ; Franc Alef, diss. de otio claus. cod. c. 2 ; C. A. Tittel, opusc. de claus. cod. taciti subintellect. Jen. 1759, § 51, seq. ; Hassler on the operation of the tacit cod. clause, etc. (German) in d. Sam. f. Abh. Th. 1 ; Stryk. de caut. test. cap. 23, § 32 ;

Lauterbach, coll. th. pr. ht. § 17 ; Wernher, pt. 1, obs. 279 ; Walch, controuv. p. 342, ed. 3 ; Hellfeld, l. c. § 20 ; H. W. Schorch, diss. qua claus. cod. præsump. non dare adseritur, Erf. 1763 ; Boehmer, diss. de verb. direct et obliq. § 15 ; Exor. ad Pand. 1, 116.

³ § 1191, h. op.

⁴ Gaius, 2, 285.

equity substantially following the principles laid down by Augustus but 751 years after the building of Rome.

§ 1337.

Fidei commissa, as their name implies, were originally entirely dependent upon the honour of the person to whom they were directed; the property vested in the testamentary heir, who might or might not execute the request made to him—might or might not violate the trust imposed on him.

Origin of fidei commissa.

The first historical notice we have of this mode of testation occurs in Cicero,¹ Quintilian,² and Valerius Maximus, who relates that Q. Pompeius Rufus, who, being an exile, could take nothing by the will of a Roman citizen, nevertheless received property from a certain person, who had made over certain landed estate by way of fidei commissum in trust to his mother for him,—and we further learn that she executed this trust.

§ 1338.

As may naturally be supposed, acts of dishonesty often occurred in the operation of a system totally uncontrolled by law; and it is probable—indeed, we are told—that the frequency and prevalence of breaches of trust led Augustus to take measures for the regulation of a system which it had become impossible to abolish. *D. Augustus primus semel iterumque, gratia personarum motus,³ vel ob insignem quorundam perfidiam, jussit Consulibus auctoritatem suam interponere. Quod quia justum videbatur et populare erat, paulatim conversum est in adsiduam jurisdictionem tantusque eorum favor factus est, ut paulatim etiam Prætor proprius creatur qui de fidei commissis jus diceret, quem fidei commissarium adpellant.*⁴ Thus it appears that Augustus gave the cognisance of such business to the consuls, who appointed a commission of delegates yearly for the purpose of regulating testamentary trusts, and of compelling their performance according to the directions of testators.

Augustus recognises fidei commissa.

Consular jurisdiction concurrent with the prætorian.

The authority of the consuls, however, in matters of trust, did not extend to the provinces, which remained therefore still under the old system, until Claudius⁵ extended the power formerly committed by Augustus to the consuls, to the presidents of provinces.⁶ With respect to Rome, he confirmed this jurisdiction too, and made it a perpetual attribute of the consuls, and moreover appointed two prætors with exclusive jurisdiction over *F. C.*, thence termed prætores de fidei commissis.⁷ These new judges

Extended to the provinces.

Two prætors appointed at Rome for *F. C.* test.

¹ De finit. bon. et mal. 2, 18, § 56.

² Declam. 325; Vel. Max. iv. 2, 7.

³ The persons here alluded to are probably L. Lentulus and his hæres fidei commissarius, whose hæres fiduciarius Augustus also was.

⁴ I. 2, 23, § 1.

⁵ Suet. Claud. 23.

⁶ I. 2, 23, § 1; P. 1, 2, 2, § 32; Ulp. 25, 12; Gaius, 2, 278; Quinct. Inst. Orat. 3, 6, § 70.

⁷ Grut. Inscr. p. 393, n. 6; PR. DE. FIDEI. COMMISS.

were not to send the causes down by writ to the *judices pedanei* for trial, as was the practice of the prætors in other cases, but to adjudicate thereon themselves. This bears a striking resemblance to the practice of the equity judges of England, especially under the old system, where an original writ was issued out of chancery, containing the form of action, to be tried by the common law judges, who in so far stood in the place of the *judices pedanei* of the Romans.

Trajan withdrew a prætor.

Trajan withdrew one of these prætors, and, as the consuls had concurrent jurisdiction, it was usual for the prætors or prætor to adjudicate in the minor cases, and refer those in which a larger interest was concerned to the consuls.¹ The emperors themselves even occasionally took cognisance of *F. C.*, according to Papinianus.

§ 1339.

Fidei commissum universalis, in what they differed from testaments.

F. C. might be a particular or a universal mode of acquisition of the former, has been treated of under the singular modes of acquisition, and applies to a particular thing, *res singularis*, left in trust to be delivered by the heir to a third person, whereas a *fidei commissum universale* goes to the whole inheritance, which will pass by it; nevertheless, the heir in trust differed from the direct heir in many material points:—

Where the *possessio* is *vacua*, a direct heir can assume the possession if not opposed; whereas,

The heir in trust must await the administration of the direct heir, and the delivery by such to himself, except in case of refusal to administer on the part of the fiduciary heir, with other concurring circumstances.²

A direct heir can only be appointed by a formal testament; whereas,

An heir in trust can be nominated in three several ways.

A direct heir must administer (*adire hæreditatem*), in order that it may vest in him, and pass through him to his heirs.

The heir in trust transmits the estate to his heirs, without even having declared that he would accept the trust, *fidei commissum licet nondum agnitum ad hæredes transmittitur*,³ but not a real right by the mere falling in of the *F. C.*, but a mere right of personal action against the fiduciary heir to compel him to administer.⁴

¹ Cuj. obs. 21, 34; Merillus, obs. 6, 36; Quinct. l. c.; P. de prob. 26. Perhaps there was an appeal to the consuls as to the chancellor from the chancellors.

² Vid. § 1347, h. op. n. 3; Nov. 1.

³ P. 36, 1, 25, pr. et 46; C. 6, 42, 3; Struv. ex: 36, sh 45; Bachov. ad Treutler,

vol. ii. disp. 14, th. 8, lit. A; Averan. interp. lib. 4, c. 6, 7, 8; contra, Faber, de error. prag. dec. 31, err. 1, conditional *F. C.* vest from the fulfilment of the condition; C. 6, 51, 1, § 7.

⁴ P. 5, 3, 63; F. 36, 1, 1; Averan. l. c. Westphal. Verm. § 1850.

§ 1340.

In bequests in trust, *fidei commissa* (*F. C.*),¹ there are three parties:—

The *testator fidei committens* is the testator who commits his inheritance wholly or in part to his heirs, by them to be delivered up according to his directions (*T. F. C.*).

The *hæres fiduciarius* (*H. F.*), so called from the *fiducia* reposed in him by the *testator fidei committens*, whose business is to pass the inheritance to the person for whom he takes it in trust, and still continues heir after execution of his trust; he is not a mere usufructuary, for the inheritance is absolutely his own up to the time at which he must deliver it over.²

The *hæres fidei commissarius* is he who is to receive the inheritance in whole or in part (*H. F. C.*).³

Parties to a *fidei commissum testamentarium*.
Testator *fidei committens*.

Hæres fiduciarius.

Hæres fidei commissarius.

§ 1341.

A *fidei commissum* was *tacitum* in its proper classical sense, when made *secretly* with a view of evading the *lex caducaria*, and had not the sense of implied applied to it in later times.

The secret *F. C.* are said to have been noticed in the *lex Pap. Popp.*, but there is no sufficient proof of it; under *Vespasian*, however, the *Sen. Plancianum* contained a provision forbidding them under penalty of loss of any *caduca*,⁴ to which a claim might be laid under a will. *Tacitum* is, however, now synonymous with *implicitum*, as contradistinguished from *expressum* applied to a *F. C.*, left clearly and expressly to a certain person, and not by implication and the obvious understanding of the instrument.

The *fidei commissum tacitum*

declared illegal.

§ 1342.

The old law required, in order to erect a *F. C.*, that the person should be legally capable of testation, but it was exactly these incapacitated persons who sought relief in *F. C.*; the new laws, however, made the *F. C.* of such persons dependent upon the right of testation; but there were cases in which a man might erect a *F. C.*, but from circumstances was unable to make a will.⁵

Whoever can be instituted direct heir can be *F. C.* heir;⁶ by the old law this was otherwise, for he could be heir to its uses, to whom all property could be left directly, and these were the very cases in which *F. C.* were used to evade the law.

All heirs could be burthened with *F. C.*, whether intestate-testamentary, civil, or prætorian heirs, *hæredes directi et fidei commissarii*. Thus,—I may direct my heir A to deliver the inheritance to B, and B to C, &c. But *Justinian*⁷ thought right to

Who could create a *fidei commissum*.

¹ For the sake of brevity these contractions will be used.

² P. 34, 2, 15; Vinn. ad I. 2, 4, pt. n. 6.

³ P. 5, 1, 50; Nov. 108, 2; I. 2, 23, § 3, § 6; P. 42, 1, 141, § 1; Faber, frag. 27, 5; P. 36, 1, 43 & 78, § 10; Cuj. obs.

12, 1, 2; Vinn. sel. qu. 1, 55; Westphal. Verm. § 1732, § 1865.

⁴ Ulp. 25, 17; P. 49, 14, 29, § 1; P. 34, 9, 8, 17, 18, § 1.

⁵ P. 30, (iii.) 1, § 1 & 5.

⁶ Ulp. 25, § 25.

⁷ Nov. 115.

limit this power to four degrees, which are reckoned thus, first degree,—A is my heir and shall deliver the inheritance to B.

First degree, *Caius hæres esto hæreditatem ut Seio restituet.*

Second degree, *Seius Sempronio.*

Third degree, *Sempronius Titio.*

Fourth degree, *Titius Q. Sexto.*

§ 1343.

Family fidei
commissa in
Germany resem-
ble entails.

This limitation is not observed in Germany in the so-called *Familien fidei commissa* instituted as a substitute for a majority, than which they are much more effective, lasting so long as any member of the family exists. Thus, a testator directs "my estate shall remain a fidei commiss in my family for ever," whereupon the estate acquires and retains the *qualitas fidei commissaria* so long as any descendent of that blood remains. We find in the Novella¹ a case of this description, which is a rarity, as individual disputes are not usually inserted in these decrees. A testator directed, *hanc rem per omnia et perpetuo velim permanere in familiâ mea, neque unquam de meo nomine egredi.* Justinian assigned the estate, after the fourth restitution, to two women as heirs of the last possessor, annulling the subsequent trust.² In some continental states attempts are being made by the Radical party to get these family entails abolished, of which Montesquieu shows the error in demonstrating the evils following the partition of land. "*On sçait que Romulus,*" says the president, "*partagea les terres de son petit état à ses citoyens,*"³ *il me semble que c'est delà qui dérivent les loix de Rome sur les successions.* * * *

Their advan-
tages according
to Montesquieu.

*La permission indéfinie de tester accordée chez les Romains, ruina peu-à-peu la disposition politique sur le partage des terres; elle introduisit, plus que toute chose, la funeste différence entre les richesses et la pauvreté. Plusieurs partages furent assemblés sur une même tête; des citoyens eurent trop une infinie d'autres n'eurent rien. Aussi le peuple, continuellement privé de son partage, demanda-t-il sans cesse une nouvelle distribution des terres. Il le demanda dans le temps où la frugalité et la pauvreté faisoient le caractère distinctif des Romains, comme dans les temps où leur luxe fût plus étonnant encore.*⁴

Majorities with regard to land are preserved by those *F. C.* in Germany.

§ 1344.

Free testation
becomes circum-
scribed by indi-
viduals, even
when free by
law.

Blackstone⁵ very correctly remarks, that the law of Solon, by which he permitted testation on failure of issue, was soon pro-

¹ Nov. 159, 2 & 3.

² Westphal. v. Verm. et F. C. Th. 1, § 352-57; Rittershus, ad Nov. 159, n. 4; Fachineus, 4, 10; Struv. ex. 36, th. 20; Knippschild, de F. C. fam. c. 9, n. 404, seq.; Hofacker, prin. I. Ger. 7, 2, § 1585;

Erhard, de F. C. fam. obs. pract. Lips. 1806.

³ Dion. Hal. 2, 3; Plut. Numa et Lyc.

⁴ Esprit des Loix, 27, 1, 8.

⁵ Book 2, ch. 23.

ductive of intestine discontent and tyranny, resulting from a too great accumulation of property in individual hands, and of the final subdivision of the state. The prohibition to testate was a public measure intended to obviate the evil ; and on an unlimited power to do so being given by law, practice proved the error of the measure, and private persons contrived for themselves a family law to meet the evil in effect, very much the same as the general law of which they had complained. Effect of, in Greece ;

In Germany, where anciently wills were unknown and the intestate succession of children was alone recognised, a free system of testation was next introduced at a very early epoch with the Roman law ; but so soon as that great continent became civilized, a system of family trusts sprang up equivalent to the majorities now established in England, whereby the free action of the tenant in possession was effectively shackled and circumscribed in perpetuity. in Germany ;

In England, the system of entails is less extensive indeed, but in its practical operation closely allied to that of Germany. in England ; Although an entail is usually destroyed in every generation, it is likewise revived in every succeeding step of the pedigree, for the principle being, that an entail can only extend to one person *in posse* or unborn, and requires the consent of the next heir *in esse* to its destruction, it is usual for the heir in tail to agree with the ancestor in possession to destroy the entail, and allow the estate to be burthened *in futuro* by the tenants in possession, on consideration of a certain income being granted and paid *in presenti* to the heir in tail until the tenant's demise ; the estate is then resettled on the issue of the heir-at-law generally, or on a particular person born or to be born ; to effect this a trust is created ; consequently, most estates in England are in trust, or, in fact, are fidei commissary. The same re-occurs when such issue comes to manhood, and so on. Foreign writers have attributed the political prosperity of England to this system of majorities ; and if we look at the present state of France, it will lead us to believe that their conjecture is well founded. in France. Since the first revolution it has been a law finally settled by the Code Napoléon, that land must be divided among the legal heirs with a stipulation forbidding gratuitous alienation during life, and all substitutions are forbidden ;¹ the result of this mixed system has been that usually resulting from mixed and half measures, viz., to produce the very same evil as a system of free testation would have introduced, by cutting up the country into small plots or sums, progressively subdivided in each generation, too small for the subsistence of the possessor, or to give a vested interest in the state. These small patches or sums are collected temporarily into the hands of large capitalists, and create the very evil produced by the law of Solon and of the Decemvirs upwards of twenty-five hundred years ago.

¹ Cod. Civ. Nap. L. 54, t. 2, § 896.

§ 1345.

Fidei commissa
conditioned as
to circumstances
or time.

A *F. C.* may be left conditionally or unconditionally, as,—*Seius hæres meus esto sed semissem hæreditatis Sempronio statim restituat*; or conditionally, on a circumstance, as,—*Seius hæres esto, si liberi legitimi ei non supersint Sempronius hæreditatem sumito*; or conditionally, as to time,—*Seius hæres esto durante vita hæreditatem habeto, illo mortuo Sempronius hæreditatem sumito*. By these subterfuges the law, which forbade an heir to be instituted directly, from and till a time fixed (*directa hæredis institutio ex certo die et in certum diem*), was evaded, and the same result attained.

Inconvenience
of the old law.

But although the *H. F.* might thus be dispossessed perhaps of the whole inheritance beyond his legal share, he remained notwithstanding heir in the contemplation of the law, and was bound to pay the debts of the estate; hence it was possible that he was not only without any benefit, but might be exposed to real loss, and it was for this reason that the *H. F.* often repudiated such trust estates, and that the testaments became *destituta* in consequence.

Remedied by
the *S. C. Trebellianum*.

To remedy this defect, the emperor Nero, on the 25th August, issued his decree to the consuls elect, Annanæus Seneca and Trebellius Maximus, to bring a *S. C.* into the Senate, to the effect that *restitutâ hæreditate omnes actiones quæ hæredi et in hæredem competeant, ei et in eum dentur cui ex fidei commissis restituta est hæreditas*, transferring the actions from against the *H. F.* to the *H. F. C.* After this we find the prætor allowed equitable actions to be brought against the *H. F. C. post quod S. C. prætor utiles actiones ei et in eum qui recepit hæreditatem quasi hæredi et in hæredem dare cœpit*.¹ Nevertheless, the *H. F.* remained heir *nudum nomen hæredis retinet*, the *H. F. C.* being considered *loco hæredis*. This was termed the *exceptio S. C. Trebelliani*, or a plea by statute. In practice the action was probably commenced against the *H. F.*, who, pleading the *S. C.* discovered who the *H. F. C.*, or, in English law, *cestuique use*, was, and prayed relief, whereupon the prætor granted the equitable action before mentioned.

Words of the
S. C. Trebellianum.

The words of the *S. C. Trebellianum*, as we learn from Ulpian,² were as follows:—*Quum esset æquissimum in omnibus fidei commissariis hæreditatibus si qua de his bonis iudicia penderent, ex his eos subire, in quos jus fructusque transferretur, potius, quam cuique periculosam esse fidem suam, placuit et actiones, quæ in hæredes hæredibusque dari solent, eas neque in eos, neque his dari, qui fidei suæ commissum, sicuti rogati essent, restituissent, sed his et in eos, quibus ex testamento fidei commissum restitutum fuisset, quo magis in reliquum confirmetur supremæ defunctorum voluntates*. Justinian's law upon this *S. C.* has been the subject of much controversy;

Disputed passage
on this *S. C.*

¹ I. 2, 23, § 4.

² Ulp. lib. 3; P. 36, 1, 1.

the suggested alteration in the punctuation by Savigny, however, renders it pretty clear :¹—*Et sine scriptura per F. C. hæreditas recte relinquitur. Igitur si uxor tua, et prævignum suum, indiscrimine mortis constituta, designavit velle successionem obtinere : usque ad dodrantem ejus voluntatem ratam servari convenit ; quum ab intestato ei succedentes, de restituendo fidei commissio conventos ultra quartam, ære alieno deducto, quantum penes eos sententia Scti. relinqui præceperit, tantum obtinere præstiterit.*² Here the husband and his son must be supposed to be in possession of the whole inheritance, hereupon the intestate heirs bring an action for their fourth, which it would have been in their power to retain, and to have made the husband and his son plaintiffs instead of defendants, had they the intestate heirs been in possession instead of the husband and his son.

§ 1346.

The *H. F. C.* was, however, not only answerable *pro rata* ; therefore, if he had received in truth and in fact but half the estate, he would be obliged to pay but one-half of the debts.

The inconvenience remaining after the *S. C. Trebellianum*.

This provision, however, failed to satisfy fiduciary heirs to whom nothing was left, for a person might be instituted who had no claim for the *portio legitima* ; such heirs, therefore, often repudiated the inheritance, which became destitute as before. To induce them, therefore, to administer, it was necessary to pass some law which, by making it their interest to administer, might afford a remedy to the inconvenience. With this view, the consul Pegasus, whose colleague was Pusio, framed a *S. C.* in the reign of Vespasian, founded on the principle of the *lex Falcidia*, which it extended to *F. C.* empowering fiduciary heirs to retain a fourth part of the inheritance free of all incumbrance, even although the *T. F. C.* might have left him less, and to deliver the remaining three-fourths to the *H. F. C.* To this provision a penalty was appended, for should the *H. F.* despite this advantage repudiate the inheritance, it was held to have been administered *in contumaciam*, and the *H. F.* compelled to deliver it in its entirety. This *S. C.* was, after its promoter, termed *Pegasianum* ;³ and, as it was in fact a mere extension to *F. C.* of the *Falcidian* law, which thitherto had applied to legacies only, this fourth part was not termed *pars Pegasiana*, but *pars Falcidia*,—hence, when the *H. F.* restored three-fourths, he was looked upon as a legatee to the extent of such one-fourth.⁴ Justinian⁵ deprived the *H. F.*, whom he transformed into a legatee, of his fourth, if he neglected to make an inventory ; but the testator

Caused the passing of the *S. C. Pegasianum*.

¹ Sav. Zeitsch. f. geschichtliche Rechtswissenschaft, 2 B. No. 13, vide et Cramer.

² As equivalent to *prævaluerit* by the Glossa.

³ Contius, lib. 2, lect. cap. 4, in opp. p. 81, et l. 1, c. 3, disp. p. 139.

⁴ Vinn. ad l. 2, 23, § 3.

⁵ Nov. 1, 2.

could expressly bar the Falcidian law, which before that time he was not at liberty to do.¹

§ 1347.

Law of F. C. remained unaltered from Vespasian to Justinian whose constitutions thereon are lost.

The effect of these alterations.

Thus stood the law, as far as we have reason to suppose, unaltered up to the time of Justinian, who confirmed these *Scæ.* with certain modifications, which were to be considered as incorporated in, and as forming a part of, the *Sc. Trebellianum* and *Pegasianum*; as, however, these constitutions are unfortunately lost, we are restricted to presuming their particular tendency from the meagre and general information conveyed in the *Institute*² on this subject, according to which, the effect of these constitutions was, firstly, to enable every *H. F.* of the whole or part of an inheritance to withhold his Trebellian fourth; but if he voluntarily handed over the entire inheritance, to pass the *actiones hereditariæ* over to the *H. F. C.*; where this, however, was not the case, as when he was directed by the testament to hand over the moiety only, or retained his fourth by virtue of the law, then to pass over the *actiones hereditariæ pro rata portionis* only, in the above cases to the extent of a half or three-fourths respectively, thus rendering the *stipulationes partis et pro parte* unnecessary. Secondly, to compel the *H. F.* to administer, should he refuse *adire hereditatem*, and to pass³ the *actiones hereditariæ* over to the *H. F. C.* These provisions, however, involved certain logical and legal consequences. The inheritance must have been judicially *taken as administered* to where the *H. F.* contumaciously refused to administer, since otherwise the will could not have been supported;⁴ but instead of being *in contumaciam*, the *H. F.* might simply have died; if he had then already administered, or otherwise passed the legal estate to his heirs, they would have been exposed to the same actions as he himself would have been had he lived; if, on the contrary, he had died without heirs *after* administration, the inheritance would be held to have passed to the *H. F. C.*;⁵ but if he died *before* administration and without heirs, then it appears there would have been no remedy, but the testament must have failed as destitute, involving the uses and trusts or *F. C.* dependent upon it.

The codicillary clause, however, if such existed, would have remedied this misfortune, because the intestate heirs could in that case have been reached.⁶ The result would have been different in the case of a *direct* heir dying after the death or during the lifetime of the testator, nor would it be material whether this latter had or had

¹ P. 35, 2, 27 & 64; compare *Id.* 88, § 2; Westphal. Verm. § 1263, etc.; et vide P. 35, 2, 96 & 56 § 5, as to in how far this depended upon the heir; C. 6, 50, 9; P. 35, 2, 59; C. 6, 50, 33; C. 35, 2, 36; C. 3, 28, 36, pr.; Nov. 131, 12, as to in how far this depended upon the nature of the legacy; P. 30, 1, 28, § 1; P. 35, 2,

81, § 6 & 1 § 10, as to in how far this depended on the heir.

² I. 2, 23, § 7.

³ § 1339, h. op. n. 2.

⁴ Westphal. Verm. § 1724.

⁵ C. 6, 49, 7, § 1.

⁶ C. 6, 42, 14; Westphal. l. c. § 1589.

not been aware of the fact, for in such cases the testament even of a civilian, *paganus*, was upheld, so far as its *F. C.* or uses and trusts were concerned, for the benefit of, and as an act of justice to the *H. F. C.*¹ The privileged testament of a military man as in other cases, so also in this, formed an exception, and was not affected by these contingencies.²

§ 1348.

A *F. C.* can be left either in a written testament or nuncupatively, that is, by oral command, to the direct heir, for it will be a good bequest if he be told to execute the trust in question, even though no witnesses be present;³ nor is any acceptance on the part of such heir necessary as some suppose, or any promise to execute the trust; it suffices that he has been directed to do so;⁴ nay, he may even be put upon his oath as to the matter, that is, the *juramentum delatum* may be required of him. A *F. C.* may also be created in a codicill.

A *F. C.* can be left in a testament written or oral, or in a codicill.

Where the *H. F.* holds by *direct* appointment in the case of the payment of legacies as in that of universal *F. C.*, the *H. F.* has a right to have his fourth clear, consequently, he could demand back the excess paid in error, whereby his fourth is infringed;⁵ on the other hand, everything which the *H. F.* may have received from the testator, *quocunque nomine*, by way of legacy, *donatio mortis causa titulo universali singulari*, or otherwise, was included in the fourth to which he was legally entitled, and everything the testator allowed him to retain.⁶ But to this rule there are three exceptions:—

The profits accruing from a fourth, or by the fault of the *H. F. C.*;⁷

The prelegacies paid by co-heirs;⁸

Everything received from a legatee on discharge of a condition.⁹

§ 1349.

From the above it appears that, where the *H. F.* is directed to hand over more than three-fourths of the inheritance, he is authorized to retain one-fourth, which is termed *pars Falcidia* by the Roman, and *Trebellianica* by the middle age jurists.

The retention of the Trebellian fourth.

Not only can the testamentary, but also the intestate heir be

¹ P. 29, 1, 14; Donell. com. F. C. lib. 7, c. 21; Boehmer, Rechtsfälle, 1 B. nr. 29.

² P. 29, 1, 13, fin.; C. 6, 42, 5.

³ C. 6, 42, 32; I. 2, 23, § 12.

⁴ Puf. T. 4, obs. 112; Müller ad Leyser, obs. 626; Harprecht, l. c. n. 696, seq.; Wernher, p. 3, obs. 2; Puf. animad. jur. n. 85.

⁵ P. 36, 1, 22, § 5; I. 2, 23, § 7.

⁶ This is a disputed point. Höpfner, com. § 614; Bolley, Verf. über L. 91, ad

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L. Fal. et vide Jurid. Arch. Tub. 1803, 3 B. 1 Hft.; P. 35, 2, 86 & 91; P. 36, 1, 1, § 16, 30, § 3; I. 2, 23, § 9; C. 3, 36, 24; Cuj. obs. 8, 4, supports the identity of the Q. Treb. et Q. Falc. Moeller de Q. Treb. et utrum aliqua parte differat a Q. Falc. Heid. 1815; Arch. f. C. P. 4 B. 3 Hft. nr. 30; vid. Pfordhen, l. c. p. 82-111.

⁷ P. 36, 1, 22, § 1, 2.

⁸ P. 35, 2, 86.

⁹ P. 35, 2, 91.

A F. C. could
be directed to
intestate heirs.

directed to transfer the inheritance,¹ nor is this unjust, because it is in the testator's power utterly to exclude such heir-at-law from the succession; this duty, then, is one which he is bound to perform in consideration for his *portio legitima*, which he has a right to receive *sine ullo gravamine*.

§ 1350.

The deduction,
how made.

The deduction is made from the entire inheritance,—

Save when the *H. F.* is allowed to retain any particular thing amounting to a fourth in itself;²

Save when he has received his fourth out of profits for which he is bound to account; and

Save when he has received that amount out of the proceeds of a sale.³

To suppose a case:—

	Aurei.
Let the estate amount to	12,000
The fourth to	3,000
The fruits enjoyed to	6,000
Three-fourths thereof	4,500

Now, inasmuch as these three-fourths amount to more than his legal share, he is not justified in making any deduction, but must restore the inheritance in its entirety of 12,000 aurei.

	Aurei.
But should the estate amount to	12,000
The fourth to	3,000
The fruits enjoyed to	2,000
Three-fourths thereof	1,500

In this case the heir can deduct, in addition, 1,500 from the inheritance, and retain his fourth, and 1,500 aurei in addition, because, if the fruits enjoyed equal or exceed the fourth, the *H. F.* is not authorized to subtract anything; but as the fruits on three-fourths of the integer are only taken into account, or, what is the same thing, he is only charged with three-fourths, the one-fourth is not charged against him, for it accrued on his own property.

§ 1351.

Payment of the
debts of the in-
heritance.

Now, since the *H. F.* had his fourth free, and was directed to deliver the half only to the *H. F. C.*, he delivered such half and paid the debts *pro rata* under the *S. C. Trebellianum*; thus, if he had delivered but one-third and retained two-thirds, he paid two-thirds of the debts, and the *H. F. C.* one-third; but if by this arrangement it turned out that he had not one-fourth clear, to which he was entitled under the *S. C. Pegasianum*, he deducted

¹ P. 36, 1, 6, § 1; C. 6, 42, 5.

² I. 2, 23, § 9.

³ P. 36, 1, 3, § 3.

such fourth, and stipulated with the *H. F. C.* that he should pay three-fourths of the debts; should the *H. F. C.* decline this proposition, the *H. F.* would naturally threaten to repudiate the inheritance, in which case the *H. F. C.* would get nothing; or if the court compelled the administering in *contumaciam*, it would also compel the *H. F. C.* to pay the debts, or agree with the *H. F.* to do so on condition of his administering. This agreement was in fact the *stipulatio partis et pro parte* made between an heir and a *legatarius partiarius*.¹ This arrangement was necessary, because the *S. C. Pegasianum* did not particularly mention the *actiones hereditariæ* in cases of the delivery of the inheritance, hence the *H. F.* would have been liable to the creditors; he therefore protected himself by this agreement, and, if sued by creditors, brought his action on the agreement against the *H. F. C.*

§ 1352.

A *H. F.* must give to the estate the same care that a man of common prudence does to his own affairs up to the term of the *restitutio*,² and must not sell of his own authority aught that he should hand over; but if he do so, the *H. F. C.* is competent, when the proper time arrives, to impugn the sale as null and void;³ nor is it an impediment, so that the object to be delivered is an entire inheritance.⁴

The fiduciary heir is answerable for culpa levis. When that may alienate parts of the estate.

Nevertheless, he may alienate in particular cases,—

When all interested concur therein,⁵ in which case he may infringe even the last fourth part;⁶

By reason of agreement;

When the testator's debts render it indispensable;⁷

of debt;

When the property would spoil by keeping,⁸ in which case the value realized must be substituted in the place of the object sold;⁹

of preservation;

When the *H. F.* is unable to grant a dower, or *donatio propter nuptias*, for his own benefit, without it,¹⁰—and may, in this case also, infringe the last fourth share;¹¹

of dower;

When the testator has permitted it, especially when he has permitted the surplus only to be handed over,—in such case the *H. F.* may freely dispose of three-fourths, nor can that which he has realized by sale of a *species* be demanded of him, nor that of a *genus* no longer in his possession.

of permission of the testator.

¹ § 1162, h. op.

² P. 36, 1, 22, § 3; v. Löhr, Theor. culpæ, p. 170.

³ P. 36, 1, 3, § 3; P. 36, 2, 88, § 14; C. 6, 4, 3, 1; Hellfeld, de F. C. fam. illustr. c. 2.

⁴ C. 6, 4, 3, § 2, 3; Archiv. d. C. P. 8 B. 1 Hft. p. 56-7; contra, Löhr, Mag. 4 B. 1 Hft. p. 96.

⁵ P. 30, 1, 120, § 1; C. 6, 42, 11.

⁶ Nov. 108, 1; Reschardt. de F. C. ejus quod superfuturum erit Jen. 1785.

⁷ Lochner, Unterf. d. Fr. Bamb. 1795, 8; contra, Hellfeld, I. F. § 1587.

⁸ P. 30, 1, 114, § 14.

⁹ P. 36, 1, 22, § 3.

¹⁰ P. 31, 2, 70, § 3; Id. 71-2.

¹¹ Vid. supra, 5, n. 5.

§ 1353.

Obligations of the fidei commissary heir to the fiduciary heir:

to pay debts;

to give caution, for eviction;

and suffer the quartan deduction.

The *H. F. C.* must repay to the *H. F.* all extraordinary expenses incurred on the substance of the inheritance to be handed over, as well as for payment of the debts of the estate,¹ for the costs of a compulsory administration.² He must pay

All the claims of the *H. F.* on the testator, in so far as this latter may have had no set off against them;³

Bear the contingency of accidents;⁴

Give security to the *H. F.* in the case of the eviction of whatever be assigned to him, be they farms, *mancipia*, or other things; and for that of objects which may be subsequently alienated by him;⁵

And lastly, as has been seen, he must submit to the deduction of the *quarta Pegasiana*, *Falcidia*, or *Trebelliana*, under whatever name it may pass.⁶

§ 1354.

Obligations of the fiduciary heir when the testator directs the whole to be delivered.

When only directed to deliver an imaginary part.

What he must not deliver.

It is the duty of the *H. F.* to hand over the object in its entirety;⁷ and where the direction of the testator is imperative, everything must be delivered to which the disposition extends, with exception of such things as do not strictly pass under such disposition, but vest in the *H. F.* by virtue of other and superior provisions, such as a sepulchre and the like;⁸ but where the direction is generally to deliver *everything*, the *H. F.* must hand over even that which has accrued to him by a *titulus singularis*, including prelegacies⁹ received from others.¹⁰ If, on the contrary, he be merely directed to deliver the inheritance or an imaginary part thereof, such principal object of the inheritance or the part mentioned is only due together with the profits¹¹ arising from it, and whatever has been added to it by the *jus accrescendi*. Hence he does not deliver objects not appertaining to the inheritance,¹² or anything received by way of *donatio inter vivos* from the testator;¹³ neither does he deliver what he has received *titulo singulari*, on particular grounds, in virtue of the will;¹⁴ nor prelegacies, in so far as he may have contributed to the same, except the testator have expressly decided otherwise;¹⁵ nor such profits as may have been fairly derived in virtue of the testator's will after administration;¹⁶

¹ P. 12, 6, 40, § 1; P. 30, 1, 58; P. 36, 1, 19, § 2 et 22, § 3; Gottschalk, disc. form. T. 3, n. 5.

² P. 36, 1, 7 & 11, pr.

³ P. 30, 1, 123; P. 36, 1, 27, § 11; Lauterbach, de conf. § 12, 13.

⁴ P. 31, 2, 58, § 6 & 77, § 18.

⁵ P. 36, 1, 69 & 72.

⁶ I. 2, 23; v. d. Wynperesse, de F. C. Rom. Hist. Lugd. B. 1822.

⁷ P. 36, 1, 78, § 12 & 16.

⁸ P. 36, 1, 42, § 1; Id. 55, pr.

⁹ P. 36, 1, 3, § 4; C. 6, 49, 6; P. 34, 9, 18, § 2.

¹⁰ P. 36, 1, 27, 1; Voet. ad ed. § 49.

¹¹ Voet. 36, 1, § 38; contra, Cuj. obs. 12, 1, 2; Faber, err. prag. dec. 37, cr. 5; Vinn. qu. sel. 1, 55; Rossberger, de jur. accres. Ber. 1727, p. 213-16; Baumeister, Anwachsungsrecht, Tub. 1829, § 121-5.

¹² P. 31, 2, 77, § 12.

¹³ Voet. l. c. § 36.

¹⁴ P. 35, 1, 44, § 5, 6, 7.

¹⁵ P. 36, 1, 18, § 3; P. 35, 2, 86, 35, 2, 3, § 4; v. d. Pfordten, de præleg. Erl. 1832, p. 47-52; sed vide Voet. l. c. 37; Nieto de præleg. c. 4, § 14; Pfeiffer, de eod. § 22; Hofacker, T. 2, § 1633.

¹⁶ P. 36, 1, 18 & 22, § 2 & 14, § 1.

nor objects accruing from inequitable judgments and the absurd acts of others.¹ Lastly, he is not compellable to hand over objects alienated by himself, the sale of which is, in case of necessity, allowed him, in as far as they are not compensated by profits.²

§ 1355.

In respect of third persons, the *H. F.* naturally stands in the full position of an heir *before the restitutio* and the *H. F. C.* is ignored. *After the restitutio*, however, an entirely new state of things arises. In consequence of the *Sct. Trebelliana*, *Pegasiana*, and constitution of Justinian,³ the *H. F. C.* is bound to take the burden of the inheritance on himself, in part or in whole, according as the fiduciary heir has retained certain objects⁴ or handed over a part. He pays the legacies only to the extent of the *activa* or property *in esse* of the inheritance;⁵ and if he have not made an inventory, he must pay the debts out of his own property⁶ as a punishment for his neglect, while the creditors have their subsidiary remedy against the *H. F.*⁷ On the other hand, the *H. F. C.* has his *actio utilis* to the extent of his share in the estate,⁸ and the same obtains as to *F. C. successiva*.⁹ But the *H. F.* cannot transfer the actions belonging to the estate to the *H. F. C.* for an excess, when he has handed over more than he ought to have paid, although it be an imaginary and not a defined part, as one-third or the like, but remains responsible to creditors to that extent,¹⁰ as well afterwards as before.

Position of the
H. F. and *H.
F. C.* in respect
of third persons.

§ 1356.

The *H. F.* may be deprived of his deduction on certain grounds:—

On account of a privilege, when a *F. C.* is left to a charitable institution,¹¹ and in the case of a military testament.¹²

As a penalty, when compelled to administer¹³ for neglecting to make an inventory¹⁴ for fraud,¹⁵ by voluntary renunciation,¹⁶ or by the testator forbidding the deduction.¹⁷

The Canon law, the *hæredes necessarij* can in addition deduct

When the fiduciary heir is deprived of his fourth by way of penalty.

¹ P. 36, 1, 59, § 1.

² P. 36, 1, 22, § 4.

³ I. 2, 23, § 1-7.

⁴ Id. § 9.

⁵ P. 36, 1, 1, § 17; Boehmer, de leg. ex *F. C.* præst. (Elect. T. 1, n. 7).

⁶ C. 6, 49, 2; P. 36, 1, 4 & 45; contra, Weber ad Höpfner, l. c. § 602, n.

⁷ I. 2, 23, § 7, in fin.; contra, Voet. 36, 1, § 60.

⁸ P. 36, 1, 63, § 1 & 70, pr.; Faber, l. c. Dec. 65, § 9.

⁹ P. 36, 1, 1, § 8.

¹⁰ P. 36, 1, 63, § 3.

¹¹ C. 1, 3, 39; Nov. 131, 12; Voet. 35,

2, § 16; Westenberg, princ. D. 35, 2, § 29; Conradi, pr. de Quart. Fal. leg. in don, deor. relict. deduc. Helm. 1747; Bardili. de leg. ad P. C. § 2; Thibaut, P. R. § 917, n. c. f.

¹² P. 36, 1, 3, § 1.

¹³ P. 36, 1, 4; I. 2, 23, § 7.

¹⁴ C. 6, 30, 22, § 14; Nov. 1, 2, § 2; Hofacker, 2, § 1541; Thibaut, l. c. § 877.

¹⁵ C. 6, 50, 15; Thib. l. c. § 917, & § 920.

¹⁶ P. 36, 1, 45.

¹⁷ Nov. 1, 2, § 2; Menzell in Löhr, Mag. 4, B. 2, 3 Hft. S. 354-62, as to a tacit prohibition.

their *pars legitima* in all cases, except in those where the *quarta Trebelliana* was due, nor can they be precluded by the testator from making the deduction, which is always taken from the substance of the property; they can, however, be forbidden to deduct it in all other cases.¹

§ 1357.

F. C. univers.
and legata
assimilated by
Justinian.

Justinian having assimilated legata with *F. C. universalis*, the provisions which apply to the one are equally applicable to the other; and it was seen that the whole inheritance could be left as a legacy in a codicill of which the intestate's heir had then the administration.

§ 1358.

In England uses
resemble F. C.

The cestui
que use.

When *uses* were introduced by the clergy into England to evade the statute of Mortmain,² the feoffee to uses, who was the *H. F.* of the Roman law, was the only owner recognized by the Common law; and all capable of taking an estate in land were capable of becoming *cestui que use* or *H. F. C.*,³ hence a forfeiture by the feoffee defeated the interest of the *cestui que use*; but, on the other hand, the *cestui que use* could not be reached by the Crown or creditors, because he had no tenure. To remedy the first inconvenience, the statute of Henry VI. was passed to protect the *cestui que use* from forfeiture by the feoffee; and that of Henry VIII., termed the *statute of uses*,⁴ consolidating and amending intermediate statutes,⁵ transmuted the equitable interest of the *cestui que use* into a legal estate of like nature or *into possession*, and rendered him, instead of the legal owner, liable to all the burdens to which he would as legal owner have been exposed.

Trusts.

In consequence, however, of it being decided at law shortly after the passing of the Statute of Uses, that a use could not be created on a use, as it could by the Roman law, if an estate were conveyed to A for the use of B, in trust for C, C took no interest,⁶ upon the principle that this would not be an executed use in his favor under the statute; and a use must consist like a Roman service, *in patiendo non in faciendo*; to remedy this, the courts of equity decided, that although C took no estate or interest at law under the statute, yet that B should in the Court of Chancery be deemed a trustee for C.

Cestui que trust.

Since the statute, therefore, the person for whose benefit a trust is created, is termed the *cestui que trust*; the person for whom

¹ C. 6, 49, 6, pr.; X. 3, 26, 16-18; Boehmer, de lib. F. C. onerat. (elect. T. 1); Bauer, opusc. T. 1, n. 13; Puf. T. 2, obs. 83; Leyser, obs. 633-5; contra, Faber, E. P. Dec. 11, er. 5, 7.

² 15 Rich. II. 2, 5.

³ Saund. uses, 66.

⁴ 1 Rich. II. 9; 4 Hen. IV. 7; 11 Hen. VI. 3; 1 Hen. VII. 1.

⁵ 27 Hen. VIII. 10.

⁶ Tyrrell's case, Dy. 155; 2 Bl. Com. 336; Gilb. us. Sugd. ix.

the legal estate is vested, is termed the trustee : an *executory trust* imposed some active duty on the trustee, an *executed* one such as imposed no such obligation, and was, in fact, equivalent to an use.

Testamentary trustees, called in English law executors, may, like an *hæres fiduciarius*, be appointed by a will for the person therein named, and be directed to pay at once, or annually, a certain thing or sum to another person, either contingent on a certain event, on a certain day, or up to a certain day, or, in fact, in any way the testator may have chosen legally to direct; but this office differs from that of the fiduciary heir (for the executor has, in fact, the same office to perform) in certain respects; on the one hand, he has not the advantage of anything resembling the Falcidian, Trebellanian, or Pegasian fourth, his office being purely gratuitous, except a legacy be left him, which, however, is by no means compulsory on the testator; should he on that account repudiate the trust, the testament is in fact destitute, and the deceased intestate, but the court grants administration to his wife, next of kin, or creditor, with the will annexed, which is the *bonorum possessio secundum tabulas* of the Roman law, whereupon he must execute the trusts of the will; but if there be none such, then the court will grant administration with the will annexed to the nominee of the Crown, the estate having become *bonum vacans*.

Testamentary trusts.

The executor is, however, not exposed to the perils to which a Roman heir was formerly subjected, for if the estate be insolvent, *hæreditas damnosa*,—that is, if the debts of the testator exceed the assets—he is not bound *ultra vires hæreditatis*, and to an action at law being brought against him can plead his *plenè administravit*, or account of assets, in answer to a bill in Chancery. But if he make no inventory, the court presumes he has sufficient assets of the testator in hand to pay all debts and legacies, and he may be compelled to do so out of his own property, if solvent; and if he, having paid a legacy, finds the estate exhausted, he cannot recover the sum so paid in error, although the co-legates can, in order to have it divided among them *pro rata*.¹ Hence the rule coincides with that of the Roman law, which forms, in fact, the basis of testamentary law in all Christian countries.

Peril of executor restricted by inventory.

¹ Ves. 193.

A SUMMARY

OF THE

ROMAN CIVIL LAW.

BOOK III.

TITLE XIII.

Successio Legitima—Suitas—Legitima Adgnatorum—Successio—Senatus Consultum Tertullianum—Senatus Consultum Orphitianum—Successio Cognatorum—Mohammedan Intestate, Succession, Sharers, distant Kindred—Residuaries—Servilis Cognatio—Successio Libertorum—Adsignatio Libertorum.

§ 1359.

THE privilege of testation, as has been remarked in the beginning of Title XI., was an exception, although, indeed, a very ancient one, from the old Roman law of succession, and in itself a restriction of the natural law of occupancy. Succession, according to the rules prescribed by the general law, was, nevertheless, left subsisting in its full vigor, in case of the deceased not having availed himself in a legal manner of the advantages allowed him by law of testation. Thus it may be said that occupancy ceded to two laws which successively yielded to each other,—succession by law yielded to succession by testament, occupancy to both; succession by testament failing, succession by law claimed its elder right; but on its failure, succession by occupancy, under the form of the succession of the fiscus, representing the state obtained.

Origin of succession by law.

The law of succession is twofold, based upon a testament, termed *testamentarium*, or regulated by the provisions of the law, and called *legitima*, or *successio ab intestato*. This succession may accrue in various ways,—either the deceased may have neglected to make a testamentary disposition of his property during his life, and consequently on his death the *vacua possessio*, if not appointed by law to some one, would become common property; or the deceased may not have had the right to make a will *testamenti factio*, a right confined to a peculiar

Intestacy may arise from the absence of a will, or from an informal one.

class,¹ hence *successio ab intestato est successio legitima quæ deficiente testamento deferretur illis quibus natura et leges deferri voluit.*² The term "intestate" indicates in its literal sense that no will was made, yet in a legal sense the expression is modified, and a will may exist, but one invalid by law; thus, if the deceased make a will invalid *ab initio*, he is held to die intestate, for as the law *ex speciali gratiâ* allows a man, contrary to natural law and to the general civil law, to direct the disposition of his property after he has ceased to have any physical control over it, so he on his part is expected to conform with the rules in such case made and provided, under pain of forfeiting the right by his testament being declared *nullum* or *injustum*. The same reasoning applies to a testament which, although good in the beginning, becomes *ruptum*, *irritum*, or *destitutum*, or is ultimately rescinded as *inofficiosum*, for here either a superior law governs the case, or circumstances over which neither the law nor testator has control destroys the testament. In all these cases, then, the deceased is said to die intestate. With respect to the latter part of the definition, *natura et leges*, by the former (*natura*) is implied the principle of natural law, viz., that in a natural state of society the nearest relations would inherit, and, this principle being established, the law of man (*lex*) recognises and confirms it,—nor is there any distinction to be made in the Roman law in respect of the descent of moveable or immoveable property, both following one and the same rule.

§ 1360.

Montesquieu's
view of suc-
cession by law.

The President de Montesquieu traces the law of succession to the division of land made by Romulus,³ the principle of which was that the property of one family should not pass into another; whence, two orders of heirs only are recognised in the Roman law,⁴ viz., the children, and all who descend from, and were under the power of, the father, termed *sui hæredes*, and, in their default, the nearest male relatives, termed *agnati*,—hence, heirs on the female side, called *cognati*, can never succeed, because they would have transferred the property into another family,⁵ and for the same reason the children could not succeed to the mother, and hence their exclusion in the laws of the Twelve Tables. It matters not whether such *suus hæres* or *proximus agnatus* be male or female, because the relations on the female side did not succeed, that is, that although an heiress marry, her property on her death returns to her own family, and does not pass to the children. Thus the Twelve Tables make no distinction as to whether the person who succeeds be

¹ Vide § 1198, h. op. et sq.

² I. 3, 1, pr.

³ Dion. Hal. 2, 3; Plut. Num. et Lycurg.

⁴ At si intestato moritur cui suus hæres

nec exabit agnatus proximus familiam habeto, Frag. L. xii. Fab. Ulp.

⁵ Ulp. Fr. 26, § 8.

male or female ;¹ grandchildren by the son would succede to the grandfather, not so those by the daughter, the agnates being preferred to prevent the property passing into another family ; the daughter succeeded to her father, but not so her children.² Hence Montesquieu concludes, that originally the females succeeded among the Romans when such succession coincided with, but that they did not so when it was opposed to, the law respecting the division of lands, and consequently, that, this being their foundation, they were of ante-decemviral Roman origin, and in nowise referable to the Decemvirs,—in support of which theory Dionysius of Halicarnassus³ says, that Servius Tullius, finding the laws of Romulus and Numa as to the division of estates abolished, revived them, adding provisos still more stringent. The law of succession having been then established by a law of policy, was not to be disturbed by private interference ; hence the inability of a citizen to make a will, but as it was hard to deprive him of this advantage in his last moments, the expedient of passing a distinct law by will made in the public assembly was invented.

The President is farther of opinion that the law respecting the partition of lands was that which restricted the number of such as could succede *ab intestato*, and that the reason of the great extension of the rights of testation lay in the paternal power, for, as the father could sell his children, *a fortiori*, he could deprive them of his property,—hence different effects flowed from different principles, “such,” says that great author, “is the spirit of the Roman laws.”

By the law of Athens, no citizen was allowed to make a testament, until Solon⁴ conferred this privilege on such as were childless. In Rome the omnipotence of the paternal power interfered with this principle, and it must be avowed that the laws of Athens were more consistent than those of Rome. This permission to devise, *ad infinitum*, among the Romans, ruined by degrees the politic provisions respecting the partition of lands, introducing the baneful distinction between opulence and poverty ; many shares vesting in the same individual,—“thus some had too much, others nothing, and the people, continually deprived of the partition, demanded without cessation a new distribution.”

Having traced the history of testaments till they had become established, Montesquieu remarks, that although a will was *ruptum* by the omission by the father to institute or disinherit a son, as involving an injury to the grandson, yet a similar neglect was of no consequence with respect to a daughter, as not affecting her children, who could in no case succede to their mother⁵ *ab intestato*, being neither heirs proper nor agnates.

¹ Paul. R. S. 4, 8, § 3.

² I. 3, 1, § 15.

³ Liv. 4, p. 276.

⁴ Plut. de Sol.

⁵ Ulp. Frag. 26, 7.

§ 1361.

Succession by law presumed the heirs to be *sui juris*,

Succession by law always presumed the heirs to be *sui juris*; but the succession of the *ingenui* or free born differed from that of the *liberti* or freed persons; and in this second category comes the succession of emancipated free born heirs, because they had been in *mancipio*, and emancipation was a liberation, according to Roman legal principle, from this qualified slavery, to which every free born man was originally subjected; hence, the first course of examination applies to such as become *sui juris* in the usual manner.

and is based on the Roman conception of the familia.

The basis of this succession is to be sought in the Roman conception of the *familia*, which consisted in an actual or feigned relationship with the person leaving the inheritance;¹ hence, then, the legislators held that those succeeded in the first place who claimed by procreation, adoption, and *manus*, or paternal power, and such were termed the household heirs or *sui hæredes*² of the deceased; grandchildren and more distant relations, whose fathers or grandfathers were dead or had been emancipated,³ succeeding into the place and portion of such.

Failing the *sui* the agnatus proximus succeeded,

Failing children of the house, or *sui hæredes* (for the term *hæredes sui* was never used), the law of the Twelve Tables called the *agnati* to the succession, the *proximus agnatus* being the first legal heir, which were the brothers and sisters of the deceased by the same father.⁴

but not the agnati generally.

No advancing of the following degree was recognised⁵ when the next agnate did not serve himself heir to the inheritance;⁶ nor were female agnates, beyond a sister, capable of succession,⁷ until a more liberal interpretation of the law of the Twelve Tables was adopted and conceived in the same spirit as that which gave rise to the Voconian law.⁸ Lastly, failing the agnates, the inheritance fell among the *Gentiles*;⁹ but the *relictum* of an intestate vestal virgin¹⁰ lapsed to the State.

The Hebrew law.

By the Hebrew law, the males succeeded first,¹¹ the eldest receiving a double share,¹² thus forming a sort of modified majority.

The law of the Twelve Tables.

Intestate succession was adopted into the Twelve Tables, *si intestato moritur cui suus hæres nec escit (erit) agnatus proximus familiam (hæreditatem) habeto*, the relationship on the male side called *agnatio*, which was a positive civil right (*jura agnationis sunt civilia*), apart from natural right, but it did not extend to

¹ Vid. § 683, § 716, h. op.

² Gaius, 3, 1-6; Ulp. Fr. 22, 14, 15, & 26-1 & 3; Coll. leg. Mos. 16, 3.

³ Gaius, 3-7, 8, 15, 16; Ulp. Fr. 26, § 2.

⁴ Ulp. Fr. 26, 1; Gaius, 3, 9-13; Coll. leg. Mos. 16, 3, 4, 6.

⁵ Gaius, 3, 15, 16; Ulp. Fr. 26, 4.

⁶ Gaius, 3, 12, 22, 28; Ulp. Fr. 26, 5; Paul. R. S. 4, 8, § 23.

⁷ Gaius, 3, 14, 23; Ulp. Fr. 26, 6; Ulp. in Coll. leg. Mos. 26, 7.

⁸ Paul. R. S. 4, 8, § 22; Paul. in Coll. leg. Mos. 16, 3; C. 6, 58, 14; I. 3, 2, § 3.

⁹ Gaius, 3, 17; Coll. leg. Mos. 16, 3-4.

¹⁰ Gell. N. A. 1, 12.

¹¹ Num. 27, 8-11.

¹² Deut. 21, 17; Gall. 4, 7.

emancipated children who had forfeited their claim on leaving the *familia*, and inherited as *sui*, not as children. The family name, sacred rights, and burial place belonged to the agnates, for which reason the Decemviri probably thought it preferable to continue the exclusion of the cognates, among whom there was no *nexus civilis*, and to confine the provisions of succession at law to the agnates alone among whom such existed; hence the *tres ordines* of the Twelve Tables, *Sui hæredes*, *Agnati*, and *Gentiles*, taking precedence in their order.

§ 1362.

The *sui hæredes* are the first in order of succession,¹ and derive their claim from the *unitas personæ*, feigned to exist between the father and his children, whose succession was regarded rather as a continuation of the *dominium*,² whence some deny they *succede* by law.

Sui hæredes,
who.

Such are *sui* as may be in the family and under the power of the deceased at the time of his death, in the first degree, such are sons, daughters, grandchildren, of either sex; on the male side, under the direct power of the grandfather.³

If the children be under power, they might be natural or adoptive; even the wife *in manu*, the daughter-in-law *in manu* of the son, as *quasi filia familias* and participators in the sacred rights, are reckoned among the *sui*; according to Ulpian,⁴ however, this appears to have ceased, probably because, in later times, wives seldom came *in manum*, and therefore took advantage of the edict, *unde vir et uxor*.

Children
under power
natural or
adopted.
In manu.

In a later age, children legitimated either by subsequent marriage, by *curiæ datio*, or rescript, obtain the same privileges.⁵

Paulus tells us⁶ that posthumous children; those who return from the enemy; those who have been emancipated once or twice, *cujusve erroris causâ probatâ*, although they may not be in the power of the father, are yet to be considered his *sui hæredes*.

Posthumi cap-
tivate reversi.

By *posthumi* are understood such, who, had they been born in the father's lifetime, would have been under his power.

By those returned from the enemy, such as could claim the benefit of the *jus postliminii* are meant.

By those once or twice emancipated, such as have been emancipated to another with a view to total emancipation,—if such person remains in the power of another for a certain time, he loses his

Qui his eman-
cipata.

¹ The law was not of Attic origin, for then the daughters succeeded, failing the sons.—Isæus, Orat. 9.

² I. Gothofr. ad Leg. xii. Tab. 5; Ant. Fab. de error. prag. Dec. 3, error. 1; Cuj. obs. 25, 14; P. 28, 2, 11; I. 2, 19, § 2.

³ Gaii. 2, 3, 5; Paul. R. S. 4, 8, § 4, seq.; Ulp. Fr. 22, 14.

⁴ Ulp. Frag. 22, 14; Caius, apud Auct.

collat. Leg. Mosaic et Rom. 16, 2; Gell. Noct. Att. 18, 6; Dion. Hal. 2, 95.

⁵ I. 3, 2, § 2.

⁶ Paul. R. S. 4, 8, § 7, post mortem patris nati, vel reversi ab hostibus aut ex primo secundove mancipio manumissi, cujusve erroris causa probata, licet non essent in potestate sui tamen patri hæredes efficiantur.

suitas; but recovers it if manumitted the first or second time, for he must be thrice manumitted in order to emancipation, and although this first and second manumission breaks (*rumpit*) the father's will,¹ yet it does not destroy the son's right of succession, *ab intestato*.² Heineccius explains *cujus erroris causâ probatâ* as alluding to a *mésalliance* or marriage between a citizen and a Latin, or the like, the issue of which would not be *sub potestate*.

§ 1363.

The *sui hæredes* succeeded in *capita*.

Their heirs in *stirpes*.

The *sui hæredes* of equal in degree divided the inheritance in *capita*, for the succession into the place of the deceased is not recognised among the agnates;³ this takes place when the inheritance is divisible, *viritim*, among the number of persons destined to succede and claiming in their own right as being of equal degree of kindred,—thus, the division of a father's inheritance among his four sons is *in capita* or individual; but it is *in stirpes*⁴ when, by a fiction at law, the children of such four sons come *gregatim*, by representation as a family, into the place of such sons so deceased, the members of such family dividing among themselves the share which the deceased would have had had he lived; suppose, therefore, one of the four sons to die before the father, leaving again four sons, their three uncles would succede *in capita*, and each take one-fourth, and their four nephews divide their deceased father's share among them,—in which case each nephew would succede to one-fourth of one-fourth, or one-sixteenth, in virtue of representation.

§ 1364.

Operation of the *suitas*.

Abstinance from the inheritance.

The *suitas* is peculiarly privileged, for no declaration is required from a *suus hæres* of his willingness to become heir; he is so absolutely from the moment in which the ancestor die,⁵ and in case of a will even before it was opened, and before he received notice of the death of the ancestor, nay, though he be an infant absent, or an idiot, the consent of the curator is not requisite for the acquisition of the heritable right;⁶ so also a will in which a *suus* is instituted cannot become destitute⁷ if such *suus* outlive the testator, for this reason, the *suus*, by intermeddling with the inheritance, *si se immiscet hæreditati*,⁸ is not for that the more heir; the act can only be looked upon as a declaration of his intention to keep the inheritance; if, however, it be pater:nt by word or deed

¹ Ulp. 23, 3. ² Gaius, Inst. 2, 8, § 1.

³ Gaius, 3, 15-16; Ulp. Fr. 26, 4.

⁴ I. 3, 1, § 6.

⁵ P. 29, 4, 1, § 7.

⁶ P. 40, 5, 30, § 10.

⁷ It might be so for immixtion or actual realization if the solvency of the estate were in question.—Paulus, R. S. 4, 8, 5, 6.

⁸ This *immixtio* of the *suus hæres* is the same as the *gestio pro heredede* of the *hæres voluntarius*, and is governed by the same rule of evidence.—Boehmer, diss. de discrim. suor. et emancipator. in success. intest. § 24; in Elect. I. C. T. 1; Puf. obs. I. U. T. 3, obs. 1; Hofacker, princ. I. C. § 622.

that he do not intend to assume and accept the inheritance, he is said *delinquere hæreditatem* or *abstinere ab hæreditate*, while the word *repudiare* is applied to others, an expression considered too harsh for one in a natural position like his. Thus, not being bound by any declaration, he is not bound by any fixed term;¹ consequently, a creditor of the father, in order to be in a position to sue a *suus hæres*, must prove an *immixtio* or intermeddling.²

Repudiation of the inheritance.

Intermeddling with the inheritance.

Those who³ support the contrary opinion assert, that though the *suus* is *ipso jure* heir, he must both declare and prove his declaration of refusal, because Justinian⁴ requires that a *suus* decline the inheritance *apertissime* within three months. But the answer to this is, that when a *suus* is sued and thereupon declines, his declaration is thereby made and is valid, because no term has been prescribed; for the Codex speaks of the case of a *suus* having prayed a *tempus deliberandi*, which implies a term. Perhaps he must prove that he has abstained during such term.⁵

Tempus deliberandi.

Again, for the like reason, if a *suus* die without any declaration or intermeddling as above; nay, although he be ignorant of the fact of his ancestor's death, the inheritance has, nevertheless, vested in him, and conferred a transmissible right to his heir.

Transmission of the inheritance in ignorance of the heir.

Thus, if a father die abroad on the Kalends of January, and the son on the Nones, in ignorance of his father's decease, his widow will take the inheritance of her father-in-law, because it had accrued *ipso jure* to her husband, and is as much her own as the rest of her deceased husband's property.

Example.

§ 1365.

The *suus hæres* in the first degree, who succede *in capita*, may be male or female; but those in the second degree, who succede *in stirpes*, or by the right of representation, must derive such right through the male line, consequently a grand or great child by a son is a *suus hæres*,—not so a grand or great child by a daughter, who is reckoned among the cognates.⁶ The Voconian law agrees in a measure with this, but goes still further, excluding women from all succession to deceased persons,—it even forbids a father to institute his only daughter his heiress, or to leave his estate to her by a trust. According to Aulus Gellius,⁷ however, the practice of admitting women as legal heirs still obtained, but was restricted to the *consanguineæ*, which appears a deviation from the spirit of the Voconian law.⁸

The *suus hæres* might be male or female.

The Voconian law.

¹ Boehmer, l. c. § 11.

² Boehmer, l. c. § 25; Koch. diss. de exhæredit. suis ad prob. abst. haud oblig. Giss. 1766; Walch, controuv. p. 303, ed. 3.

³ Averan, interpr. lib. 1, c. 9; Finistres, de Avel. O. H. p. 291; Puf. T. 3; obs. 8; v. Steek, n. 13, p. 183.

⁴ C. 6, 30, 23.

⁵ Weber on the obligation oneris probandi in civil process, 6 Treat. n. 28 (German).

⁶ Paul. R. S. 4, 8, § 10.

⁷ N. A. 20, 1.

⁸ Paul. R. S. 4, 8, 22; l. 3, 1, § 15.

Principle extended by Valens, Theodosius, and Arcadius.

Valens, Theodosius, and Arcadius, thought proper to alter this rule,¹ and to allow grandchildren by a daughter to succede to the maternal grandfather or mother, together with the sons and daughters of the deceased, with the proviso, however, that they should receive only two parts of the maternal portion, and that the third should remain to the sons and daughters; this was again changed by the 118th Novell., of which hereafter.

§ 1366.

Wives in manu possessed the *suitas*.

Wives in manu succeeded to their husbands as *sue hæredes*, κοινωνούς πάντων χρημάτων τε καὶ ἱερῶν,² in their capacity of *filiae familias*, or daughters of their husband, by the fiction already frequently alluded to, and by which Laurentia succeeded her wealthy husband, Tarrutius.³ The frequency of such occurrences, however, diminished in proportion as the *conventio in manum* fell into desuetude, and the marriage by *usus* obtained; hence, in later times, wives were not admitted to the *B. P.* The prætorian edict, *unde vir et uxor*, however, came to their assistance, and gave such wives the *B. P.* as though they had been in manu, in cases where there was no one living who had a prior claim.

§ 1367.

Suitas destroyed by cap. dem. and by emancipatio.

The rights of the *suitas* were destroyed in three ways; by the *maxima* and *media capitis deminutio*, because the heir being thereby deprived of his civil status, was incapable of receiving property under the civil institutions of his country.⁴ Emancipation had a like effect, because the family bond was broken, and such children became civilly strangers to their family; in like manner, and for like reasons, the children of such conceived after their parent's emancipation were disqualified.⁵

The edict unde liberi in favor of emancipated children.

The prætorian edict, *unde liberi*, came, however, to the aid of the emancipated children thus excluded from the *suitas* by the Civil law, and gave them the *B. P.* as if they had been in their father's power at the time of his death.⁶ This was even extended to the children of those emancipated, but not to those of such as had been adopted, who never could obtain the *B. P.* as *quasi cognati*;⁷ the prætor's edict did not even extend to those who, though emancipated, had been adopted by others since, except they had been again emancipated before the father's death.⁸ Adopted children, by a constitution of Justinian, were held to belong to the family, and to be under the power of their natural father, and only so far belonged to the family of their adopting

¹ C. 6, 54, 9.

² Dion. Hal. 2, 25.

³ Macrob. Sat. I. c. 1, 10; Plut. Quæst. Rom. 35. It is not clear, however, whether she succeeded by law or by testament.

⁴ Vid. § 402, h. op. et seq.

⁵ I. 3, 2, § 9; I. 1, 12, § 9; Paul. R. S. 4, 8, § 12.

⁶ P. 38, 6.

⁷ Paul. R. S. 4, 6, § 12.

⁸ Ulp. Frag. 28, 8, 10.

father as succession to his estate, together with his other children when he died intestate, was concerned.¹

§ 1368.

The *adgnati* are said to be *cognati per virilis sexus personas* The adgnati.
cognitione conjuncti quasi a patre cognati, a bond which might be natural by procreation, or civil by adoption;² this definition distinguishes *adgnati* from *cognati*, but not from the *gentiles*, who nevertheless are also distinguished by the law of the Twelve Tables.

Failing the *sui heredes*, from any cause whatever, the *proximus adgnatus* succeeded to the estate by the law of the Twelve Tables, The succession of the proximus adgnatus. and so strictly was this rule adhered to, that should the *proximus* fail by any accident, the inheritance would not pass on to the more remote³ *adgnati*; sex, on the contrary, was no impediment, provided they were *adgnati* or *adgnatæ*, both being admissible by the law of the Twelve Tables; in the process of time, the lawyers laid down the rule that the *adgnata* should only inherit to the second degree, that is, sisters by the same mother and father, or at least of the same father, *sorores germanæ et consanguinæ*, should succeed the brother, thus the brother's daughter would not succeed her uncle, although the uncle would succeed her. The prætor's edict of *unde cognati* admitted that class, however, to succession, on a principle of equity; the male adgnates succeeded both, whether allied by blood or civilly; nevertheless, the nearer excluded the more remote, and we have seen this latter was not advanced by the death of those before him; some are of opinion that the inheritance in such a case passed to the *gentiles*,⁴ others that it followed the rule of *bona vacantia*, and as such lapsed to the exchequer.⁵ The prætor changed this; permitting, in case the next adgnate declined the inheritance, or died, the more remote to succeed, not as adgnate, but as cognate; hence a nearer cognate excluded the adgnate.⁶ Justinian gave this a still greater extension, by a decree to the effect that the more remote adgnate should succeed as *such*, and not as cognate, and could, consequently, not be excluded by cognates of a nearer degree; although this decree is lost, its contents are preserved in the Institutes.⁷ The edict unde cognati in favor of the adgnati.

This exclusion of the more remote adgnate has been looked upon as a pedant adherence to expressions not intended to be interpreted in so strict a sense, but it is far from proved that such was the case; it is by no means improbable that the decemvirs meant what they wrote, and that their object was to distribute the property among the *gentiles*,⁸ or ingenuous and free citizens of the same name and family, and that the decemviral intention was Why the more remote adgnates were excluded.

¹ §§ 683, 693, 696, 704-5, h. op.

² I. 3, 2, § 1 & 2.

³ I. 3, 2, 7; Cui Inst. 2, 8, § 4; Paul.

R. S. 4, 8, § 23; Ulpian, Fr. 25, 5.

⁴ Schulting, ad Coll. L. L. Moes. et Rqm. p. m. 794; Leger, dis. de suc. edicto.

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⁵ Vinn. ad I. 3, 2, § 2; Balduinus et Hotomannus, *ibid.*; Orat. ad Cai. 2, 8, 4.

⁶ Vinn. l. c.

⁷ I. 3, 2, § 7.

⁸ Vid. § 370, h. op.

first to admit *sui*, that is, direct descendents, but to limit their succession by the exclusion of those not in the ancestor's power; in like manner, to admit the *adgnati* or collaterals, but to limit their succession to one degree only; for the whole object of these law commissioners was to unfetter, not to restrict, the disposition of property after death, and to this end they introduced the power of testation before unknown.¹

§ 1369.

Ascendentes .
could not suc-
cede by the law
of the Twelve
Tables.

As inheritances by the law of the Twelve Tables could not ascend, consequently, the father could not succede his son; for if under power, the son had nothing of his own, and only acquired for his father; but if the son were emancipated with reservation of the *jus patronatús contractu fiduciæ*, then the father could succede him not indeed as son, but as *manumissor*, and thence as *quasi patronus* to his *quasi liberto*; but if he had not reserved this right, the fiduciary father acquired it; nevertheless, the prætor, in his equitable jurisdiction called the natural father to the *B. P.* by the edict *unde decem personæ*.²

The edict unde
decem personæ.

These ten persons were—the father; the mother; the grandfather of the male or adgnate, as well as of the female or cognate side; the grandmother, as well of the adgnate as of the cognate line; the son; the daughter; the grandson, born of a son or of a daughter; the granddaughter, born of a son or of a daughter; the consanguineous or uterine brother; the consanguineous or uterine sister.³

Reciprocal suc-
cession of
mother and
children.

Mother and children reciprocally did not inherit from each other, because they were cognates to each other, nor could the mother be considered an adgnate, *nisi convenisset in manum*; this, the prætor also extended, giving the mother administration by the edict *unde cognati*, and so the matter remained, until Claudius⁴ allowed a mother to succede as a consolation for the loss of her children; the *Sctum. Tertullianum* again amended and enlarged this provision, but when and by whom it was introduced is a question of considerable doubt.

§ 1370.

The Sctm. Ter-
tullianum.

In the Institutes⁵ we find that the *Sctm. Tertullianum* was passed under Hadrian, but no consul, *Tertullius*, appears in the *fasti consulares* of that reign; some suppose it was passed under Antoninus Pius, A. D. 158, *Tertullus et Sacerdos Coss* being mentioned in that reign, because that emperor had sometimes borne the *prænomen* Hadrian, acquired by adoption; ⁶ under Hadrian, however, no such consul existed; but, as far as that is an objection, many consuls, probably *consules suffecti*, not found in the *fasti*

¹ de Colquhoun.

² I. 3, 10, § 2.

³ Val. Max. 5, 7, 5; Ulp. ap. Auct. Coll. Legg. Mos. et Rom. 16, 9; I. 3, 10, § 2.

⁴ I. 3, 3, § 1; Suet. in Claud. 19.

⁵ I. 3, 3, § 2.

⁶ P. 36, 1, 93 & 58, c. 3; P. 35, 2, 91 & 93; P. 48, 6, 5, § 1; P. 5, 1, 37; Cuj. ad I. 3, 20, § 4; P. 46, 1, 26 & 49, § 1, but his view appears to be erroneous; Paul. R. S. 1, 21, 1.

consulares, are mentioned in legislative enactments; hence we must assume this *Sctum.* was passed under Hadrian as stated, because *Tertullus et Maximus Coss* are mentioned in the law,¹ but that these were mere *consules suffecti* whose names have been lost.

According to this *Sctum.*, a free born mother with the *jus trium liberorum*, or a freed mother with the *jus quatuor liberorum*,² could inherit from her intestate legitimate and natural son or daughter, even though under power; this provision did not, however, extend to the grandmother, whom Justinian admitted subsequently;³ now, if the mother were still under power, she could only succeed on order of the father, as is the case with a *filius* or *filia familias*.

Confers heritable rights on the mother.

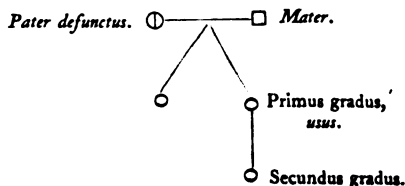
The conditions, then, were—

That the mother should have the *jus liberorum*;

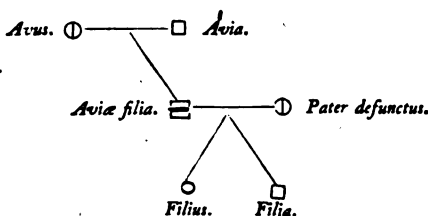
That the child should have died intestate;

That no relations should exist who had a precedence over her; for if the deceased left children or grandchildren, father or *fratres germanos aut consanguineos* of the deceased, such excluded the mother; if, however, these were only sisters, the mother shared with them.

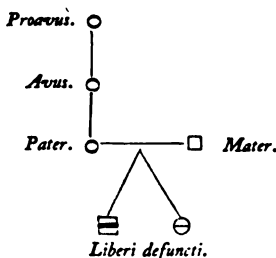
The children of the deceased being *sui*, or those in their place, of the first or a more remote degree, precede the mother.



The son or daughter of a deceased *sua filia* precede the mother of the deceased daughter.⁴



The father of both, but not the grandfather or great grandfather, precedes the mother, when it is a question between these two.

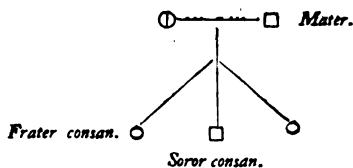


¹ P. 48, 5, 29, § 5; Zonaras, 12 (C. 1, T. 1), p. 593.

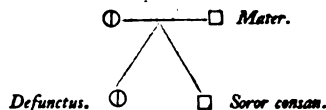
² Paul. R. S. 4, 9, 1 & 7, 8.

³ Nov. 118. ⁴ C. 6, 54, 4; C. 6, 56, 11.

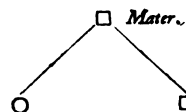
The brother by blood of son or daughter excludes the mother.



The sister by blood inherits with the mother.



If there be brother and sister by blood, and a mother with children, the brother excludes the mother, and the inheritance is equally divided between brothers and sisters.



By Justinian's former decrees¹ the mother succeeded with the brothers and sisters of the deceased; if brothers only, she had a *portionem virilem*,² that is, as much as a brother,—but if sisters only, she got half the inheritance: this was again altered by the Novell. 118.

§ 1371.

Principle upon which the Twelve Tables excluded the mother.

The law of the Twelve Tables did not give the inheritance of an intestate mother to her children, upon the principle of women being incapable of having intestate heirs;³ neither could relief be sought in the *B. P.* under the *edictum unde liberi*, which applied only to *sui*, or to such as would have remained *sui* had they not been emancipated.⁴ Still, it was possible for children to sue for the maternal inheritance, or to institute the *querela inofficiosi testamenti*, even before the reign of Marcus Antoninus, the philosopher, for when mothers were emancipated by their fathers, and then had no longer any agnates, the children obtained the *B. P.* under the edict *unde cognati*,—on obtaining which, it was not competent to them to impugn the testament of the mother, as was permitted to others to whom this *B. P.* had been granted.⁵ If, on the other hand, the mothers were *in manu*, they were in the position of *consanguinei*, or relations by blood to the children,—hence the children, being as it were next heirs, could, on administration, doubtless impugn the maternal testament as inofficious;⁶ indeed, examples of such suits being brought are mentioned by classical writers.⁷

¹ C. 8, 59, 42, ult.

² Nov. 22, 47.

³ Ulp. Fr. 26, 7.

⁴ P. 38, 6, 1, § 6.

⁵ P. 5, 2, 6, pr.

⁶ P. 5, 2 7.

⁷ Vel. Max. 7, 7, 4, 8, 8, 2; Plin. Ep. 5, 1; Schult. Jurisp. Antejustin. p. 668.

§ 1372.

The *Sctm. Orphitianum*, which was passed under Marcus Antoninus,¹ A.U.C. 931 and A.D. 178, during the consulate of Vettius Rufus and Cor. Scipio Orphitius,² gave the children the same description of right in succession to their mother as the foregoing *Sctm.* had to this latter, for, generally speaking, the rights of succession were reciprocal, depending upon which died first,—hence the sons and daughters of a *liberi* or *libertina*, legitimate or otherwise,³ whether *sub potestate* or *sui juris*, nay even those who had suffered the *capitis deminutio minima* by change of family,⁴ succeeded to their mother in preference to her *consanguinei* and *adgnati*; the *jus accrescendi* or *cretio*⁵ was, moreover, given to the heirs of such as had died previously. By this *Sctm.* the son could also acquire the inheritance of the mother by gestion.⁶

The *Sctm.*
Orphitianum.

Its provisions.

Valentinianus, Theodosius, and Arcadius, extended this privilege to grand and great grandchildren;⁷ and Justinian still further, to the issue *liberi vulgo quæsi* of mothers, who were neither of gentle blood (*illustres*), nor had legitimate children,⁸ — but the provisions of this *Sctm.* became obsolete, and we find the children succeeding to both father and mother under the same law.⁹

Changes in
this law by new
provisions.

Becomes ob-
solete.

§ 1373.

Cicero¹⁰ calls those gentiles, *qui inter se ejusdem nominis sunt, qui ab ingenio oriundi sunt, quorum majorum nemo servitutem servivit, qui capite non sunt deminuti*; the reason of the addition *qui ab*, &c. is, probably, that *liberti* often assumed the *nomina* and *cognomina* of their patrons; Cicero, then, wishes to exclude this class, as he truly ought, for between the *libertus* and his patron there is nothing more than a civil bond, and none by blood.

The succession
of the gentiles.

When no *adgnati* existed the *gentiles* succeeded, to the exclusion of the *cognati*; *gentiles* were such as bore relationship to the deceased, but could not prove the degree; hence the law of the Twelve Tables, *si adgnatus nec escit gentilis familiam hæres nancitor*, who, as they could prove no degree, inherited together; hence, in later times, this became obsolete, as every heir was obliged to show his degree of relationship;¹¹ and the *gentiles* having lost sight of their connexion, the *adgnates*, properly so called, alone remained.

¹ I. 3, 4, pr.; Ulp. Fr. 26, 7; Jul. Cap. vit. M. Anton. Ph. 11; Grut. Inscr. 575, n. 1; H. Noris. Ep. Consul. p. 462, T. 11, Th. A. R.

² P. 38, 17, 6 & 9; P. 50, 16, 230. Julianus Rufus, and Gavius Orphitus were to have been consuls, A.U.C. 930, according to the fasti, Hab. Golzii; they are doubtless the same persons, however.

³ I. 3, 4, § 3.

⁴ I. 3, 4, § 2.

⁵ Paul. R. S. 4, 10, 4, et ibi Cujacius.

⁶ C. 6, 57, 3; vide et § 1267 & 1271.

⁷ I. 3, 4, § 1; Stockmann (resp. Fühlhaus diss. de Scto. Orphit.), Lips. 1798; Glück. P. R. § 61, etc.

⁸ C. 6, 57, 5.

⁹ Nov. 118, 1.

¹⁰ Top. 6, vid. § 368-370-2, 618, h. op.

¹¹ Chladenius de gent. vel. rom. c. 6; Glück. l. c. § 57.

§ 1374.

Successio
cognatorum.
The edict unde
cognati super-
sedes the
gentiles in favor
of the adgnati.

Now, when the *sui* and *adgnati* failed, it being impossible to ascertain the degree of the *gentiles* by sufficiently satisfactory proof, the prætor admitted the *cognati*,¹ who were not acknowledged, however, as capable of succession by the law of the Twelve Tables; but which were, on the contrary, opposed to the whole principle of cognate succession. This prætorian edict was termed *unde cognati*, by which the prætor let in those *adgnati* who had experienced the lowest degree of *capitis deminutio*, viz., by a change of a family, such as emancipated children, together with the *adoptivi*, whose rights were agnate and civil.² *Vulgo quæriti* and *spurii*, on the other hand, could possess cognate rights, though they could not have adgnate ones; slaves, however, could not possess such rights, because their *cognatio* was not recognised,³ nor could they acquire it by manumission.⁴

Succession to
bastards.

Though A be a bastard, yet he succeeds his aunt B.

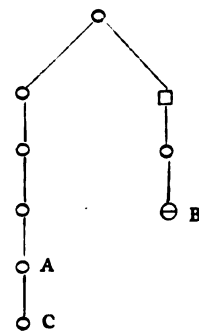
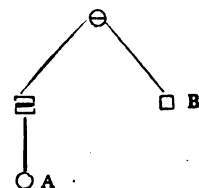
The *adgnati* were considered as *cognati* when they had experienced the *minima capitis deminutio*, except emancipated brothers and sisters, but not their children, who, remaining under power, succeeded to half shares.⁵

Prætorian
extension of
cognate succe-
sion to the sixth
degree inclusive.

Now, since the cognates of the nearest degree only were summoned to the succession, the prætor extended the privilege to the seventh degree (*sobrini sobrinæve nati natæve*),⁶ that is, such only as were related to the intestate in the sixth degree, but the *adgnati* still inherited *ad infinitum*.⁷

Then B dies, and A obtains the *B. P.*; but if B die, C does not succeed, though in the seventh degree.

Justinian⁸ equalised the rights of the *adgnati* and *cognati*, giving both a right of succession *ad infinitum*, which superseded, while it rendered unnecessary, the prætorian edict.



§ 1375.

The degrees of
cognition.

In the Institutes, a separate title has been assigned to the degrees of cognition.

Gradus are so termed from the rounds of a ladder.⁹

The *linea* is *directa*, up and down, termed respectively *superior* and *inferior*; or it is *transversa*,¹⁰ every person forming a new step.

¹ P. 38, 10, 10, § 2.

² P. 38, 10, 4, § 2.

³ P. 38, 8, 1, § 2.

⁴ P. 38, 8, 7.

⁵ P. 26, 4, 4; C. 6, 58, 15, § 1.

⁶ I. 3, 6, § 12.

⁷ Duaren, Com. Tit. Unde Cog.

⁸ Nov. 118, 4.

⁹ Paul. R. S.; P. 38, 10, 10, § 10; Cuj. obs. 6, 40.

¹⁰ I. 3, 6, § 7.

In the first, *linea directa superior*, were—the father and mother, *pater et mater*; in the second, the grandfather and grandmother, *avus et avia*; in the third, the great grandfather and grandmother, *proavus et proavia*; in the fourth, the great great grandfather and grandmother, *abavus et abavia*; in the fifth, the great great great grandfather and grandmother, *atavus et atavia*; in the sixth, the great great great great grandfather and grandmother, *tritavus et tritavia*; and expressions are wanting for the remaining degrees, called, by the generate term, *majores*.¹

Linea directa superior:
the first degree,
the second,
the third,
the fourth,
the fifth,
the sixth.

In the first, *linea directa inferior*, were—the son and daughter, *filius et filia*; in the second, the grandson and granddaughter, *nepos et neptis*; in the third, the great grandson and granddaughter, *pronepos et proneptis*; in the fourth, the g. g. grandson and g. g. granddaughter, *abnepos et abneptis*; in the fifth, the g. g. g. grandson and granddaughter, *atnepos et atneptis*; in the sixth, the g. g. g. grandson and granddaughter, *trinepos et trineptis*; the more remote were generally termed *posterius et posteriores*.²

Linea directa inferior:
the first degree,
the second,
the third,
the fourth,
the fifth,
the sixth.

In the *linea transversa* were, in the second degree, brothers and sisters, *fratres et sorores*; in the third, brother's and sister's sons and daughters, *fratris sororisque filii et filiae*,—paternal uncle and aunt, *patruus et amita*,—maternal uncle and aunt, *avunculus et matertera*; in the fourth, brother's and sister's grandchildren, *fratris et sororum nepotis, neptis*,—brothers and sisters of the paternal uncles, *fratres patruales, sorores patruales*,—cousins of uncles and aunts on the father's side, *consobrini et consobrini amitini et amitinae*, great uncle and great aunt on the father's or mother's side, *patruus magnus et amita magna, avunculus magnus matertera magna*; in the fifth, great grandchildren of brother and sister on the father's or mother's side, *patris et sororis pronepotes et proneptes, fratris patruelis sororis patruelis amitini amitinae*,—the children of cousins, *consobrinorum filii filiae (sobrino sobrina)*,—great granduncle, *propatruus*, on the father's or mother's side, *proavunculus*,—great grandaunt on the mother's side, *promatertera*; in the sixth, the great great grandchildren of brothers and sisters of the paternal or maternal brother or sister, *fratrum sororumque abnepotes et abneptis fratris patruelis sororis patruelis amitini amitinae consobrini consobrinae nepos neptis*,—the grandchildren of greatuncles and greataunts on the father's or mother's side, *patruus magni amitae magnae avunculi magni matertera magna nepos neptis*,—the children of great granduncles and great grandaunts on the father's and mother's side, *propatruus, proamita, proavunculi, promatertera filii filiae*,—great great granduncle and great great grandaunt on the father's and mother's side, *abpatruus, abamita, abavunculus, abmatertera*. The other degrees have no technical names.³

The transverse line:
second degree,
third degree,

fourth degree,

fifth degree,

sixth degree.

¹ P. 38, 10, 10, § 7.

² Ibid.

³ I. 3, 7, § 7; Paul. R. S. 4, 11, 1, seq.

TABLE OF THE DEGREES OF CONSANGUINITY.

<i>Trilevus.</i> Great great great great grandfather.	<i>Patruus maximus.</i> Great great great uncle.								
<i>Alveus.</i> Great great great grandfather.	<i>Patruus major.</i> Great great uncle.	<i>Patruus majoris filius.</i> Great great uncle's son.							
<i>Abavus.</i> Great great grandfather.	<i>Patruus magnus.</i> Great uncle, f. s.	<i>Patruus magni filius.</i> Great uncle's son, f. s.	<i>Patruus magni nepos.</i> Great uncle's grandson, f. s.						
<i>Proavus.</i> Great grandfather.	<i>Patruus.</i> Uncle, f. s.	<i>Patruus filius.</i> Uncle's son, f. s.	<i>Patruus nepos.</i> Uncle's grandson, f. s.	<i>Patruus pronepos.</i> Uncle's great grandson, f. s.					
<i>Avus.</i> Grandfather.	<i>Frater.</i> Brother, f. s.	<i>Fratrius filius.</i> Brother's son, f. s.	<i>Fratrius nepos.</i> Brother's grandson, f. s.	<i>Fratrius pronepos.</i> Brother's great grandson, f. s.	<i>Fratrius abnepos.</i> Brother's great great grandson, f. s.				
<i>Pater.</i> Father.	BY LAW.								

SUCCESSIONS

<i>Uxor quæ in manu viri est.</i> Wife under power.	<i>Consanguinei</i> Related to each other	<i>Filius qui ex potestate non exiit.</i> Son under power.	<i>inter se.</i> by consanguinity.	<i>Filia quæ in potestate est.</i> Daughter under power.
<i>Nurus quæ in manu filii est.</i> Daughter-in-law under son's power.	<i>Hi quoque sunt</i> These, too, are related	<i>Nepos qui ex potestate non exiit.</i> Grandson under power.	<i>inter se consanguinei.</i> to each other by consanguinity.	<i>Nepis quæ in potestate est.</i> Grandaughter under power.
<i>Pronurus quæ in manu nepotis est.</i> Grand daughter-in-law under grandson's power.	<i>Item consanguinei</i> Also related to each other	<i>Pronepos qui ex potestate non exiit.</i> Great grandson under power.	<i>sunt inter se.</i> by consanguinity.	<i>Pronepis quæ in potestate est.</i> Great granddaughter under power.
<i>Abnurus quæ in manu pronepotis est.</i> Great grand daughter-in-law under great grandson's power.	<i>Et bi inter se</i> And these are related to each other	<i>Abnepos qui ex potestate non exiit.</i> Great great grandson under power.	<i>sunt consanguinei.</i> by consanguinity.	<i>Abnepis quæ in potestate est.</i> Great great granddaughter under power.
<i>Adnurus quæ in manu adnepotis est.</i> Great great grand daughter-in-law under great great grandson's power.	<i>Sunt quoque inter</i> Are also related to each other	<i>Adnepos qui ex potestate non exiit.</i> Great great grandson under power.	<i>se consanguinei.</i> by consanguinity.	<i>Adnepis quæ in potestate est.</i> Great great great granddaughter under power.
<i>Trinurus quæ in manu trinepotis est.</i> Great great great grand daughter under great great great grandson's power.	<i>Item bi sunt inter</i> These, too, are related to	<i>Trinepos qui ex potestate non exiit.</i> Great great great grandson under power.	<i>se consanguinei.</i> each other by consanguinity.	<i>Trinepis quæ in potestate est.</i> Great great great granddaughter under power.
<i>Et cæteræ.</i>		<i>Et cæteri.</i>		<i>Et cæteri.</i>

Hence, when the *sui* and *agnati* failed, however reckoned, the prætor introduced the *cognati*; but Justinian reformed the whole.¹ The computation of degrees has already been discussed in respect of marriage² under that head.³

COMPARATIVE TABLE OF SUCCESSION ACCORDING TO THE
XII. TABLES, THE EDICT, AND THE 118TH NOVELLA.

ORDINES.		CLASSES.
XII. TABULÆ.	EDICTUM.	NOVELLA CXVIII.
I. Sui.	I. Unde liberi sui et emancipati.	I. Omnes descendentes legitimi et respectu matris etiam illegitimi ad infinitum.
II. Adgnatus proximus.	II. Unde legitimi (agnati et qui cognati et privilegiati).	II. Ascendentes fratres germani eorumque filii primi gradus.
III. Gentiles.	III. Unde cognati.	III. Fratres consanguinei et uterini eorumque filii primi gradus.
	IV. Unde vir et uxor.	IV. Omnes cæteri agnati et cognati proximi.
Regula est nec successio ordinum nec successio graduum.	Regula est successio ordinum sed successio graduum tantum in ordine cognatorum. (IV.)	Regula est successio ordinum et graduum in omnibus descendentibus.

¹ Nov. 118.

² § 615, h. op.

³ The following are the solutions of riddles there given under § 615, h. op. n. 4:—

The sister of my aunt, who is not my aunt, is *my mother*.

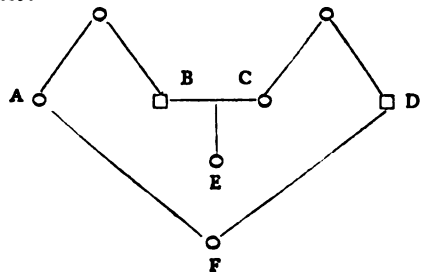
This man, whose father is my only son, is *my son*.

This child born of my mother, who is neither my brother nor her son, is *my sister*.

These children our children are,
Their fathers our brothers are (in law),
In lawfull wedlock wedded we,
Now tell us what the kindred be?

This is explained by the following tree:—

The women B & D can say of their respective children E & F that their fathers A & C are our brothers.*



* Koch de succ. ab intest. p. 289.

§ 1376.

The Mohammedan law recognises three categories in matters of succession, whom Baillie¹ terms *sharers*; the second, *residuaries usubat*, or heirs; and the third, distant or uterine relatives *zuweel-urham*. The first, he supposes to have been grafted upon the old law of the pagan Arabs by Mohammed.

The Mohammedan law of succession consists of sharers, residuaries, and distant kindred. Residuaries, or heirs usubat.

With respect to the *usubat*, or heirs, he justly remarks the great similarity which exists between their succession and that of the Twelve Tables, by which the female line was studiously excluded, with a view to the preservation of families. The descending male line inherited *ad infinitum*, thus Khuleef Allee says, that the children of his sons are his own sons. The females were, consequently, left dependent on their male relations, and their natural rights of succession were disregarded. At the same time, the author finds no trace of the *patria potestas* among the ante-Mohammedan Arabs; something very like it, however, existed among the patriarchs, from whom the Arabs delight to trace their descent; and no one can read their history, or recollect the commandments, without suspecting that it existed effectively in a very similar form.

The descending male line.

The descending male line being exhausted, the inheritance *ascends*, which is, certainly, as contrary to the old Roman law as it was foreign to the feudal succession to land in England; but here, again, the male line, unadulterated by female blood, is strictly adhered to; the same is the case in the collateral lines.

The ascending male line.

The collateral male line.

§ 1377.

The introduction of sharers is attributed to Mohammed, who relaxed the old law of agnate succession, as did the prætors, and, finally, Justinian, by his sweeping reform of the law of inheritance. First, he admitted females of equal degree to the succession with the males, in all the three lines. By his system of shares, he gave simultaneous right of inheritance to all relations distant in an equal degree from the deceased, and who, for that reason, may have been supposed to have been more or less dependent on him; whereas Justinian required the exhaustion of one line before he admitted another to a participation in the inheritance, which was divided into six not twelve parts, like the Roman inheritance. There are twelve classes of persons to whom they are appointed, whereof four are male,—the father, the agnate grandfather, the half-brother by the same mother, and the husband; the remaining eight are female, viz.—the wife, the daughter, daughter of a son however remote in the male line, sister of the full blood, or by the same father or the same mother only, the mother, and the agnate grandmother.

Mohammed introduced the system of shares.

¹ Moohammudan Law of Inheritance, p 12.

Who did not
succeede simul-
taneousl^y, or to
equal shares.

These persons do not succede simultaneously, nor are their shares always the same,—for some are, in most ordinary cases, entirely excluded; and the shares of the others, though they are always entitled to some participation in the inheritance, are liable in certain circumstances to reduction. The latter class includes the husband and wife, father, mother, and daughter; and the former, the adgnate grandfather and grandmother, the daughter of a son in the adgnate line how remote soever, the full sister and the half-sister on either side, and the half-brother by the same mother. The exclusion of these persons, the author remarks, is founded on and regulated by two general principles, applicable alike to sharers and residuaries. The one is, that a person who is related to the deceased through another has no interest in the succession during the life of that other, with the exception of the half-brothers or sisters by the mother, who are not excluded by her; and the other principle is, that the nearer relative to the deceased excludes the more remote.¹ Thus, a grandfather is excluded by a father upon both principles, being more remote, and also connected with him through the deceased; and a grandson is excluded by a son upon both principles, when that son is his father; and upon the second principle, when he is his paternal uncle.

§ 1378.

The distant
or excluded
kindred.
First class,

The distant kindred are, “all relations who are neither sharers nor residuaries.”² Their classes are four:—

second class,

The first comprehends the children of daughters and of son's daughters, howlow soever, and whether male or female.

third class,

The second comprises excluded or cognate grandfathers, how high soever, as the maternal grandfather and his father; the excluded or cognate grandmothers, how high soever, as the mother of the maternal grandfather, and the mother of the maternal grandfather's mother.

fourth class.

The third class comprehends the children of sisters, whether male or female, and the daughters of brothers, how low soever, and whether the sister or the brother, from whom they are descended, was connected with the deceased through both parents or only through one; also the sons of the half-brothers by the mother, how low soever.³

The fourth class comprises the paternal aunts of the deceased, that is, the sisters of his father, whether of the whole or half-blood; his paternal uncles by the mother, that is, the half-brothers of his father by the same mother; his maternal uncles and aunts of whatever description; and the children of all these persons, how low, and of which soever sex.

The author of the *Sirajiyyah*, in *summa*, says, “that all who are

¹ *Sirajiyyah* et *Shureefee* App. l. c. No. 115.

² *Baillie*, l. c. ch. 9, p. 127.

³ *Sirajiyyah* et *Shureefee* App. No. 217.

related to the deceased through these are among the distant kindred"; but remarks, "that this is still imperfect, not extending to many persons, who are likewise included among them."

§ 1379.

It has been before remarked, that relationship by blood, *serviles cognationes*, among slaves are so far acknowledged as to be an impediment to their cohabitation;¹ for a slave, though not a *persona*, is a *homo*, nevertheless their *contubernium* is no marriage, and confers no right of succession on them; and even after manumission the slaves have no right of succession to their children,² or *vice versâ*, by the civil or prætorian law, but the patron is his next agnate as it were, or his children failing him.

Servile
cognition.

The words of the Twelve Tables are *si libertus intestatus moritur cui suus hæres nec escit ast patronus patronive liberi escint, ex eâ familiâ* (nempe servi) *in eam familiam* (nempe patroni) *proximo pecunia adicitor* (addicitor),³ that is, the freedman's property passes into the patron family, and is inherited by the nearest heir thereof.

By the Twelve
Tables.

§ 1380.

The use of the word *intestatus*, in the above, induces the presumption that the *libertus* had a right before that period to make a will; the *liberti* among the Romans were often very rich, hence it was an important question as to who should succede to their property when they had neglected to make a will; and although in the earlier periods they became Roman citizens at once on manumission, yet the rules by which their succession was governed differed from those applicable to the *ingenui*, to whom first *sui hæredes* succeeded, and, failing such, *adgnati*, but in the case of freedmen, the *sui hæredes*; and secondly, in default of such, the patron, and failing him, his children were called to the succession, but not *jure representationis*, which here fell away, they were considered as his *adgnati*,⁴ although not *ingenui*, which may account for the *liberti* assuming their patrons *nomina*; ⁵ hence the patrons often left them a legacy on condition of their not quitting his name.⁶

Original right
of testation of
the freedman.

§ 1381.

The patron was excluded by the *sui* of the freedman, or by his wife *si convenerit in manum*, or by his children, whether

Patron when
excluded.

¹ § 617, h. op.; I. 1, 10, § 10; P. 23, 2, 14, § 2, 3.

² P. 38, 10, 10, § 5.

³ Ulp. 27, 1 & 29; I. Gothofr. Legg. XII. Tab. tab. 5.

⁴ Cuj. obs. 20, 34.

⁵ For instances, vide Plin. H. N. 25, 3 & 31, 3; Latant. Div. Inst. 4, 3; Heinec. A. R. ad I. 3, 8, § 1.

⁶ P. 32, 1 (3), 94; P. 31, 1 (2), 88, § 6; P. 35, 1, 108.

natural or adopted. The freedman, moreover, could, if such last-mentioned persons failed, pass over his patron in his will.

§ 1382.

Prætorian
succession of
the patron.

The prætors considering this unjust, gave the patron by their edict at least one-half of the deceased freedman's property; and in case he had left his patron less, this latter obtained *bonorum possessionem contra tabulas* to that amount,¹ which was even granted in the case of the existence of such *sui hæredes* as were *adoptivi* or the wife *in manu*; hence the natural children were the only persons who absolutely excluded the patron, whether *sui*, *emancipati*, or *adoptivi*, provided they were merely instituted as heirs to any portion, or petitioned for the *bonorum poss. contra tab.* since they were otherwise looked upon as disinherited, and as such did not exclude the patron.²

How the patron
succeeded.

But if *sui*, emancipated, natural, or adopted, or a wife under power were wanting, the patron and his children succeeded to the inheritance in *capita* to the exclusion of the more remote degrees; hence, if the patron was alive but the son only of another patron, the entire inheritance fell to the patron alone.

The grandchildren of patrons were also excluded if the son of another patron was in being, and thus in like cases.³

§ 1383.

The liberta had
no right of
testation.

In the case of a *liberta*, or freed slave woman, the patron invariably succeeded, for the very obvious reason, that he was her *quasi proximus adgnatus*; the law of the Twelve Tables did not allow a woman's property to pass on because she entered another family,—it therefore reverted to her original family, and this, by the fiction of patronage, was the family of her patron;⁴ thus, Ulpian⁵ informs us that the patron derived none of his rights from the prætorian edict, *in bonis libertæ patrono nihil juris ex edicto*, the patron had no necessity for prætorian equity in the case of a freed woman who had no *sui hæredes* who could exclude him; moreover, the patron being their legal tutors, the *libertæ* could neither contract marriage nor make a will without his consent and concurrence.⁶

§ 1384.

How modified
by the Papian
Poppæan law.

When, however, the *lex Papia Poppæa* before alluded to was passed to encourage a more wholesome and extended system of legitimate procreation, a clause was inserted making it lawful for freed women to exclude the patron; thus *libertæ*, who had borne four children,⁷ or who had received the *jus quatuor liberorum*

¹ Ulp. Frag. 18, 3.

² I. 3, 8, § 2.

³ Paul R. S. 3, 2, 1, seq.; P. 38, 2, 23.

§ 1.

⁴ R.

⁵ Ulp. Fr. 29, 2.

⁶ Ulp. Fr. 11, 27.

⁷ Ulp. Fr. 29, 3.

from the emperor,¹ were freed from their patron's guardianship, and could make wills in which they could, moreover, exclude such patron from any part of the inheritance; to protect the patron, however, from being defrauded of his patronal rights, the same law provided that the patron should take a *pars virilis* with the surviving children.² If a *libertus* dying left 100,000 sesterces, which was held to be equal to 100 aurei, and less than three children, whether he died testate or intestate, the patron or his male children received a virile share, but nothing if the freedman left three. If the *libertus*, however, did not die worth the above sum, the possession of which was looked upon as constituting wealth in the Augustine age, he had the free power of testation, and could exclude the patron, for it was probably not thought worth while by the patron to become co-heir if the whole estate was under that sum; but if the *libertus* neglected to make a will, and died without issue, the law of the Twelve Tables still governed the case, and the patron became intestate heir to the whole, irrespective of the sum.³

Now, as the edict of the prætor had restricted the power of the testation of the *libertus* to half his property, assigning the other half to the patron, the *lex Papia Poppæa* extended the same right to patronesses, being *ingenuæ* and mothers of two children, or being *libertinæ*, who had borne three like rights, viz., *bonorum possessio contra tabulas liberti* or *ab intestato* was granted against such as were not natural heirs; and this was extended to the children of an *ingenuæ*, who had the *jus trium liberorum*.⁴

§ 1385.

As in the earlier times of the Twelve Tables, all *liberti* became *cives Romani*, but subsequently, the great number of manumitted slaves induced restrictions of their privileges; they recovered some of them again at a later period by the *lex Papia Poppæa* under Augustus, which placed them on manumission in the category of the *Dedititii*, whence they were transferred into that of *Latini Juniani*, which class was introduced under Tiberius; none of which, however, had the right of testation,⁵ their patrons retaining their property as they would have done the *peculia* of their slaves.⁶

Rights of the freedmen to testate again restricted.

The *Sctm. Largianum*, passed A. U. C. 794 (A. D. 41) under the consulship of T. Claudius Drusus and A. Cæcina Largus,⁷ now provided that the children of the manumittor, if not disinherited by

The Sctm. Largianum regulates the succession of freedmen.

¹ Suet. Claud. 19; Grut. Inscr. p. 631, 2.

² Ulp. Fr. 19, 3; I. 3, 8, § 2; Heinec. ad L. I. et P. P. 2, 11, p. 242.

³ I. Gothofr. diss. ad leg.; Pap. Pop. 25, 296; Heinec. A. R. ad I. 3, 8, § 8; et auct. ab. cit.

⁴ Ulp. Fr. 29, 7; Heinec. l. c. 2, 22, p. 357.

⁵ P. 38, 15, 7, pr.

⁶ I. 3, 8, § 4.

⁷ Dio. Cass. 40, 10. Claudius only held the consulate two months,—Largus the whole year; hence the *Sctm.* was named after this latter.

name, were to be preferred to extraneous heirs, that is, those not related to the testator, when such were instituted by a *Latinus*¹ to the heir; and Trajan decreed that *liberti Latini*, who obtained the right of the Roman citizenship without the knowledge or against the consent of their patrons *ex beneficio principis*, should be esteemed citizens during their life, but be accounted Latins on death;² the treatment, therefore, of these classes was very severe, for the patron could thus never be deprived of the inheritance.

§ 1386.

Justinian's
legislation as to
the succession
to freedmen.

Justinian left no remnant or trace of this law; but in the Greek Basiliks (Βασιλικόν)³ it was directed positively that if a *libertus* or *liberta* die testate leaving property under 100 aurei in value,⁴ the patron should have no right of succession; but if they die intestate, and their issue fail, the law of the Twelve Tables still retains its effect; on the contrary, if the property exceeds 100 aurei, the patron is still excluded, if the *libertus* leave heirs or *bonorum possessores*; but if he die intestate, and without issue, the patron or patroness has a right to the whole as heirs-at-law: if he leave a will in which he passes his patron or patroness over, these latter can demand *bonorum possessionem* to the extent of one-third, free of all burdens, legacies, or *fidei commissa*, to legatees or children of the deceased, instead of one-half, to which he or she up to that time may have been entitled.

Justinian, moreover, extends the right of succession to the estate of *libertus*, to the collateral cognates of patrons, down to the third degree.⁵ When, however, all distinction between *Latin* and *dedititii* was removed,⁶ all *libertinii* acquired the full right of citizenship, and consequently of testation, which materially restricted the rights of the patrons.

§ 1387.

The adsignation
of freedmen.

As children inherited rights as well as property from their parents, these latter could assign to any child under power the patronage of a *libertus*; this could be done by:—1, testament; 2, codicill; 3, the form of a contract; 4, *donatio inter vivos*; 5, *mortis causâ*; 6, any words; 7, letters; 8, chirograph; 9, purely; 10, conditionally; or 11, even by simple assent,⁷ and be again revoked⁸ according to mere will and pleasure.

To be capable of assignation, the patron must have two or more children in his power;⁹ for if the child to whom such *libertus* was assigned was emancipated subsequently, the assigna-

¹ C. 7, 6.

² I. 3, 8, § 4, C. 7, 6.

³ Bas. tom. 6, p. 595.

⁴ I. 3, 8, § 3.

⁵ I. 3, 8, § 4.

⁶ C. 7, 6; C. 7, 5.

⁷ P. 38, 4, 1, § 3.

⁸ P. 38, 4, 1, § 4.

⁹ I. 3, 9, § 2.

tion was void,¹ although a *libertus* could be assigned to one already emancipated.²

The words of the *Sctm. Claudianum* which introduced this practice, passed A.U.C. 798, A.D. 45, under the consulship of Velleius Rufus et P. Ostorio Scapula,³ have been preserved by Ulpian,⁴ and are as follows:—*Si qui duos pluresve liberos justis nuptiis quæsitos in potestate haberet, de liberto libertave suâ significasset, cujus ex liberis eum libertum vel eam libertam esse vellet, is eave quandoque is, qui eum eamve manumisit inter vivos vel testamento in civitate esse desisset, solus eo patronus solave ei patrona esset, perinde ac si ab eo eâve libertatem consequatus, consequatave esset, utique si ex liberis quis in civitate esse desisset, neque ei liberis ulli essent, cæteris ejus liberis qui manumisit, perinde omnia jura servuntur ac si nihil de eo liberto eâve libertâ is parens significasset.*

The provisions of the *Sctm. Claudianum* as to adsignation.

The assignation then could be made to any child, who, if under power, *suus*, then alone succeeded⁵ to the *libertus*, and exercised the patronal rights; but if such patron suffered the *media capitis deminutio*,⁶ the right thus vacated appears to have accrued to the other children⁷ as it were by a right of cretion, together with the succession to the *libertus* thus deprived of his patron.

Jus accrescendi of assigned patronatus.

It may be a question whether this *jus accrescendi* took place under such circumstances, if the assignation was to a child already emancipated, *emancipatus*.

§ 1388.

The continuance of the patronal rights, guarded by so many succeeding legislative provisions still existent at an age when other rights founded upon the same legal basis had disappeared, proves that there must have been something more tangible in these rights than that arising from the obsolete fiction of early Rome; the explanation may probably be found in the increasing wealth of the freed class, who became in many cases a more valuable property to their patrons in that capacity than as slaves; the feudal-like services, the gifts, largesses, loans, and aliment in which they were obligated, rendered them a valuable appendage, and their inheritance therefore became a matter of importance to the rich, on account of the consequence and influence it gave them, and to the poor in a more material point of view. As, then, the importance and influence of the feudal nobility of the middle age depended upon the numbers and wealth of their vassals and those who owed them fidelity or fealty, so those of the Roman depended on that of their clients, who were, in fact, the prototype of the feudal retainer.

Why the patronal rights of succession to freedmen were so long maintained, and their

resemblance to the later feudal institutions.

¹ P. 38, 4, 1, § 8.

² P. 38, 4, 9; Modestinus Merill obs. 7, 13.

³ These names are variously stated,—P. Sullius Rufus, and P. Osterius, Asterius,

Hasterius, Austerius, Austerus Scapula, Bynk. obs. 3, 7, p. 242.

⁴ P. 38, 4, 1, pr.

⁵ Ulp. Frag. 27, 1.

⁶ Ulp. Frag. 17, 5.

⁷ Vinn. ad l. 3, 9.

TITLE XIV.

Bonorum Possessio—Its origin and exercise—The Prætors and the Centumviral Tribunal—Bonorum Possessio Edictalis sive Ordinaria—Decretalis sive Extraordinaria—Temporalis—Continua—Ex Testamento—Ab Intestato—Secundum Tabulas—Contra Tabulas—Necessaria et Utilis—Unde Liberi—Unde Legitimi—Unde Cognati—Unde Vir et Uxor—Unde Decem Personæ—Unde Cognati Manumissoris—Tanquam ex Familia—Pro Patronis—Ex Legibus et Senatus Consultis—Tempora Continua et Utilia Ratione Cursus—Ratione Initii.

§ 1389.

The bonorum possessio generally. Origin of the *jus edicendi*.

The edict was of two kinds,—as equity, and as law.

The *jus edicendi* referable to the regal power of legislation.

THE *bonorum possessio*, which properly belongs in this place, is referable to the equitable jurisdiction of the prætors; the origin of the *jus edicendi*, however, still rests on conjecture, and must be inferred by deduction from the constitutional state of the Roman commonwealth. The explanation of the origin of the edict is not difficult where it can be referred to a fiction, which gave a remedy by a side wind; but it is far less easy to account for the fact of the provisions of the edict being diametrically opposed to, and overruling the provisions of, positive law. The first legitimately belongs to the province of the judge, and is a convenient mode of extending the law to do equity; whereas the latter infringes that of the legislator, and is therefore beyond the power of mere administration.

The explanation must therefore be referred to the regal period. It has already been seen that Romulus established the senate to protect himself from the consequences which would have resulted, under the then state of society, from the enactment of laws which, while they were necessary to the maintenance of public order, and the safety of property, must often have been most unpalatable to the heterogeneous mass over whom he exercised the power of governor.¹ It is said that he was in the habit of consulting this body in matters of legislation, but the sovereign power of imposing laws on the nation was vested in himself; to use a modern term, Romulus promulgated laws “by and with the advice of the Lords spiritual and temporal and the Commons.” Legislation originated with himself, nor was it till later that the right of veto was asserted by the Commons, at least with a sensibly practical result; thus, the similarity existed² between the legal power of Romulus and that

¹ Vid. § 3, h. op.

² It is worthy of remark, that the modern principle is the converse of this. The par-

liaments propose the laws (except where the measure is ministerial), and the Crown possesses the right of veto.

of the English kings before, and even since, the Commons usurped their present power. Nay, even in the present day, legislative acts run by a fiction, like writs, in the name of the sovereign ; notwithstanding the shadowy interference the queen exercises, the ministers are, *de jure*, styled her majesty's, although, *de facto*, they are those of the parliament or nation. Romulus then enacted laws, in fact, of his own motion, but these laws were always supposed to have been approved by the senate or aristocracy of the nation, and it is not likely that they would often oppose the wishes of their chief, with whom it was their interest to make common cause ; nor can we sufficiently admire the truly regal policy of Romulus in creating an aristocracy for his own support, and of conferring upon it that almost unlimited jurisdiction which its component parts possessed individually over their own families and clients, based on the same principle as the feudal system, with the additional tie of consanguinity, real or feigned.¹ To keep any individual of the senate in check, who showed a disposition to be unruly, was for him no difficult matter, sure as he must have been of the support of the rest. The senate again exercised its influence over the general assembly, so that nothing but the coalition of a large majority of the senate could endanger the supreme regal power. That the growing power of this body, and its impatience of supreme control, produced at last the coalition which was fatal to the monarchy, cannot be doubted ; but many years elapsed before this effect took place, aided and hurried onward by the vexatious and ill-advised stretches of authority and absence of true dignity in the kings, and the injuries inflicted by them on influential members of the senate, to whom the injury itself was perhaps welcome, as their excuse for usurping the supreme command.²

Parallel between the legislative power of the kings of Rome and Great Britain.

Legislative policy of Romulus.

The cause of the fall of the monarchy.

The monarchy fell, but its attributes remained. Though vested in other individuals under a less ostentatious name, they were found still more onerous, for Rome, except perhaps momentarily during periods of internal revolution, was never a democracy such as existed at Athens, the absurdity of which is so pungently satirized by Aristophanes. From a monarchy it passed into a duarchy, and then relapsed into a monarchy, under the pleasant fiction of a dictator or lawgiver. The duarchy was again established, but soon ceded to a decarchy, which speedily relapsing a second time into duarchy then became the permanent form of government, daily diminished in power by the constantly increased assumption of authority in the senate, so that the consuls became at length little more than the executors of the decrees of this sovereign council. That the nation judged some six hundred princes worse than one, must account for the re-establishment of royalty under the emperor, the salutary policy of which measure is evidenced by the saying, " that Augustus found Rome brick,

Political changes of the Roman state.

Causes of the re-establishment of monarchy.

¹ Perhaps it represented the clanship of the Gaelic Highlands more nearly than the less artificial system of the feudal law.

² The violation of Lucretia, § 9, h. op.

and left it marble." Under him the old regal authority in legislation revived, and *leges regiae* were in fact re-enacted under denominations against which the disadvantage of a traditionary prejudice did not exist.

§ 1390.

Transmission of
regal legislative
power to the
consuls ;

to the prætors.

The prætorian
edict of a nature
triple :—
as a rule of
court ;
as a fiction ;
as an enact-
ment ;

The consuls, then, who succeeded the kings in office, inherited at first almost identically their legislative and executive functions ; but the religious supremacy was transferred from them to other officers, of whom, the *rex sacrificulus* was the only one who retained the regal title ; the press of business soon rendered the institution of judicial officers necessary, and their functions, consequently, devolved upon the prætors.

The prætorian edict may be described as triple in its nature, when it promulgated a rule of court ; and, perhaps, where a fiction was used to do equity or supply an unprovided remedy by law, the *jus edicendi* was exercised by the prætors judicially only ; but when it altered or superseded an existent law, then it was legislative ; in later times, at least, it is presumable that the prætors did not venture upon these direct innovations until the want of them had become universally apparent and admitted ; nay, perhaps practically carried out in defiance of law, so that their power was not questioned or interfered with by the senate, of the tacit consent of which, as members, they were assured, and whose feeling they had the power of ascertaining on the point without recourse to a formal decree ; the inconvenience attending this latter must, doubtless, have been ever great, although not to the same extent as at present in England ; every senator was, as a patrician, *ex officio* an educated civil lawyer, whereas the only semblance of even practical law in the British parliament must be sought among the knights of the shire, being justices of the peace, and that extending to nothing beyond trivial cases of summary criminal or semi-criminal jurisdiction, or the incepting step in more serious offences ; and it is notorious that none can talk so long on a subject as those who are the most ignorant of its principles, and since the Reform Bill Act, few lawyers can gain admittance into parliament.

§ 1391.

The power of
the centumviral
court to change
the law.

Its peculiar
jurisdiction.

The prætors, it will be remembered, presided over the centumviral court,¹ and were invested with the power of suspending the common law by their edict with respect to matters within their jurisdiction ; the power of this court in certain matters must have been very extensive according to Cicero's recapitulation of the questions over which it had cognizance,—*usucapionum, tutelarum, gentilitatum, agnationum, adluvionum, circumluvionum, nexorum,*

¹ Vid. § 332, h. op.

*mancipiorum, parietum, luminum, stilicidiorum, testamentorum ruptorum, aut ratorum, jura versari.*¹

Now, it will be remembered that there were two sorts of edicts, the *relatitium* or *tralatitium*,² or those adopted from predecessors and the *perpetuum* or the whole body of rules, fixed for the duration of the edicting magistrate's office. The centumviral court was suggested by the abolishment of monarchy, before which no judge could promulgate any edict beyond the rules of court; but after its institution, what individual officer, however high his rank and however unquestioned his power, would have ventured of his own sole authority to introduce rules so diametrically opposed to the established law as the *bonorum possessiones secundum vel contra tabulas*? This was one of the questions in which Cicero tells us the centumviral tribunal had jurisdiction; hence we must presume that alterations in the hitherto existing law must have been made in that tribunal, and that the prætors sitting as single judges promulgated mere rules of court, that is, rules as to the manner and form of administration, adopting, as a matter of course, the principles of the college termed "of the hundred" as their basis, and this will account for the edict having gradually increased to such a volume as to constitute a considerable proportion of the law. Again, some of these court rules must have necessarily been standing rules, such as the order in which plaintiff and defendant were to be heard; but others, as to time, &c., must have varied with the occupations of the judge and the custom of the epoch. The centumviral tribunal was then the old regal legislative power in commission, as also a court of appeal, set in motion when a single prætor did not think fit to incur the responsibility of deciding a doubtful case.

The duplex nature of edicts.

The Censorian and Ædilitian edicts were clearly of little importance in a legal point of view, regarding evidently mere matters of morals, and correctional police, of the same nature, though of far more legal and respectable authority than that by which streets are now closed and commerce interrupted for the remnant of some miserable pageant, aped from a by-gone age BY ORDER OF THE LORD MAYOR !!!

The Censorian and Ædilitian edicts.

§ 1392.

The law of succession has then two different origins,—that derived from the civil law, and that arising out of the prætorian jurisdiction; the first of these two has been already discussed; it now remains to examine in what cases the prætorian court either interpreted doubtful and obscure passages in the civil law, or otherwise altered it indirectly by the edict in order to meet the requirements of equity, and extend the ancient law of succession which we have

Law of succession has a double origin in law and in equity.

¹ Cic. 1, De Orat. c. 38.

Verr. 1, 14 & 43. §§ 314, 323, 327, 328,

² Cic. ad Att. 21; Ad Divers. 3, 8, in h. op.

Agnitio how distinguished from aditio.

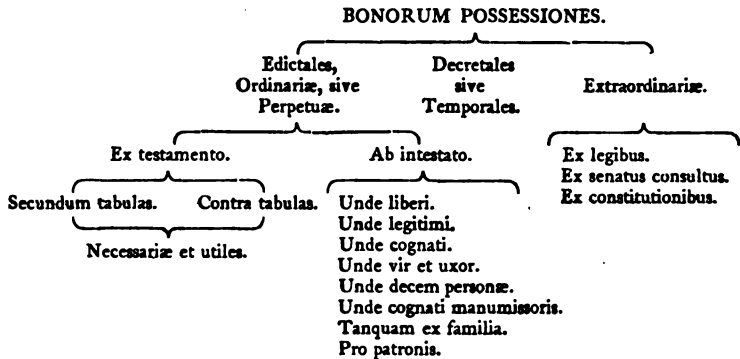
seen was much restricted ;¹ this prætorian jurisdiction was called *bonorum possessio*² in contradistinction from the *hæreditas*, *jus hæreditarium* or *jus succedendi* ; in like manner the administration of the bonorum possessor was termed *agnitio sui hæredis*, or recognition of the heir, as distinguished from the *aditio sui hæredis*, or administration of the heir by strict law. In the process of time, many cases in which the prætors had exercised equitable jurisdiction were, at a later period, made, under the same denomination, the objects of special enactments by means of constitutions of the emperors.³

§ 1393.

B. P. differs from possessio bonorum.

Bonorumpossessio differs from *possessio bonorum*, being one word like *jurisdictio*, and giving not only possession, but also a right ; whereas, the latter implies simple possession only. *B. P.* is defined⁴ to be *jus persequendi retinendique patrimonii sive rei, quæ cujusque, cum moritur, fuit*, and such *bonorumpossessor* differs in nothing from an heir, save that he derives his right from the grant of the prætor, and the heir from the civil law, *prætor bonorum-possSESSIONem hæredis loco in omni causâ habet*.⁵

Table of the B. P.



§ 1394.

B. P. is three-fold :—
edictal or perpetual, extraordinary and decretal.

The *B. P.* may be considered as three-fold,—firstly, *edictalis* or *perpetua*, granted by the prætors on equitable principles where the law demanded a more benign interpretation, and is granted to persons in a certain degree without judicial hearing,⁶ as when conferred on emancipated children, since such had by emancipation forfeited their strict claim, and this is an actual hereditary right ; secondly, these same principles, acknowledged and confirmed by an express enactment *ad hoc* when it became part of the civil law, and was termed *extraordinaria* ;⁷ thirdly, *decretalis temporalis*

¹ I. 3, 10, pr. ad fin.

² I. Richtei vind. Præt. Rom. § 10 ;
Koch, § 2, ad Glick, l. c. § 67.

³ Koch, B. P. Maranus, in Paratit. ad
Pand. § 7, 4.

⁴ P. 37, 1, 3, § 2.

⁵ P. 50, 17, 103.

⁶ P. 29, 2, 30, § 1.

⁷ P. 38, 14.

or *repentina*, to meet the exigencies of a particular case subject to judicial hearing at some future period.

§ 1395.

That *B. P.* arising out of the prætorian edict is termed *ordinaria*, whereas those are termed *extraordinaria* which result from some new imperial law in imitation of the prætorian edict, thus Hadrian granted the relations of a soldier condemned to death for a military offence their *B. P.*; there are also others,—*ex lege Papia, ex lege Cornelia, ex Sc. Aproniano*. Justinian enumerates ten prætorian *B. B. P. P.*,—viz., *contra tabulas, secundum tabulas, unde liberi, unde legitimi, unde decem personæ, unde cognati, tanquam ex familiâ, unde patroni, unde vir et uxor, unde cognati manumissoris*,¹ and calls them *ordinaria*, terming those *auxilia extraordinaria* which are *ex legibus, senatus consultis, constitutionibus principum*; hence the *temporalia* also, such as those *ex edicto Carboniano, ventris nomine, &c.*, must be classed under the extraordinary.

Ordinaria.

Anciently ten in number.

Although the *B. P.* was originally introduced for the relief of such as had no civil law claim to the succession, the prætors converted the edict into a general rule or law for the distribution of inheritances,² hence the civil heir can, if he please, adopt this as a more ready mode of obtaining the recognition of his claim, and thereby partake of the peculiar advantages connected therewith; thus the *B. P.* is said to be *necessaria* with respect to those who, without it, have no means of making their claim available; or *utilis*, when both are open also to those who, without its intervention, possess a civil right.³

B. P. necessaria.

§ 1396.

The *B. P.* called *ordinaria* was granted in cases where a testament was left, in which case it was called *B. P. testamentaria, facto testamento*; but when the prætor granted it in the absence of a will, it was termed *B. P. ab intestato*. The *B. P. testamentaria* was granted either according to the provisions of the testament, *secundum tabulas*, or in opposition thereto, *contra tabulas*, sometimes termed *contra lignum*.⁴

B. P. testamentaria s. T. or c. T. or ab intestato.

But it may occur that the *B. P.* is of none effect *sine re est*, as when the right of such *B. possessor* is questioned by another on a provision of the civil law—when he has obtained it under a condition not then fulfilled, or—when a disinherited *non suus* has obtained *B. P. litis ordinandæ gratiæ*, and thereupon failed in his *querela inofficiosi testamenti*.

Cum or sine re.

The *bonorum possessio, contra tabulas, or ex edicto unde liberi* is prayed by emancipated children in order to enable them to impugn the testament (*i. e.* to bring the *querela inofficiosi testamenti*), but

B. P. c. T. when granted.

¹ l. 3, 10, § 2 & 3; Vinn. ad id.

² l. 3, 10, pr. & § 2.

³ Koch, l. c. § 18 & 29.

⁴ P. 37, 4, 19.

this is only mentioned by Ulpian quoting Papinian;¹ for inasmuch as an emancipated child, strictly speaking, possessed no civil law right of inheritance, it was necessary to confer one upon him in order to qualify him to bring his suit.²

B. P. s. T. when granted.

Where the prætor grants the *B. P.* to the instituted heir, it is said to be *secundum tabulas*. The prætor will, in the first place, grant *B. P. c. T.* to certain persons; but if he who have such claim do not put it forward at all, or at least within the proper term, the prætor then grants the heirs instituted *B. P. s. T.* Thus it may occasionally happen that the *B. P.* is without effect, *sine re*, for instance, when the right of such *B. possessor* is questioned by another or a provision of the civil law. It was granted to legally instituted heirs in cases where there was a defect in the legal form prescribed for making a valid testament, but of the authenticity of which no doubt existed; thus *B. P.* was granted in case of a will sealed by seven witnesses,³ properly such wills should have been made *per æs et libram*; Cicero says,⁴—*si de hæreditate ambigitur, et tabulæ testamenti, obsignatæ non minus multis signis, quam e lege oporteat ad me proferentur secundum tabulas testamenti potissimum hæreditatem dabo*; and in like manner, Ulpian,⁵—*si septem signis signatum sit testamentum; licet jure civili ruptum vel irritum factum sit, prætor scriptis hæreditibus juxta tabulas bonorum possessionem dat, si testator et civis Romanus et suæ potestatis, cum moreretur, fuit; quæ bonorum possessio cum, re id, est cum effectu habetur, si nemo alius jure hæres sit*; and again,⁶—*bonorum possessio aut cum re datur, aut sine re. Cum re, si is qui accepit, cum effectu bona retineat; sine re, cum alius jure civili evincere hæreditatem possit. Veluti, si suus hæres intestato sit, bonorum possessio sine re est,*⁷ *cum suus hæres evincere hæreditatem jure legitimo possit*, that is, the *B. P. ab intestato* was granted without further examination to any one who could show any colorable title at all to the succession; but if after such grant another party proved either that the first party was not an intestate heir at all—not the next in order according to the edictal requirements—or that he was at least as near as the first, then the *B. P.* was in whole or in part without effect.

Again, the prætor will grant *B. P. facto testamenti* and *s. T.* as has already been seen, so soon as a testament signed and sealed by seven witnesses be produced, and it be proved that the testator at his decease was a Roman citizen and *pater familias*; notwithstanding which, another may come and contest the will on civil

¹ P. 5, 2, 8, pr.; P. 5, 2, 6, § 2; C. 3, 28, 2.

² Averan. interp. lib. 1, c. 8; Retes, de inoff. test. c. 20 (in Meermann, thes. T. 6, p. 533); Noodt ad Pand. t. de inoff. test. p. m. 157; Schulting, diss. de test. recess. comm. acad. T. 1, p. 278, sq.; Hofacker, princ. I. C. § 647; contra, Westphal. diss. de condit. potest. instit. liber. adjuncta. Halæ,

1758, § 7, who supposes an *interdictum quorum bonorum*; but this view is evidently erroneous, vid. Koch, B. P. § 10, et Höpfner ad Hein. § 658, n. 1, ad fin.

³ Ulp. Frag. 27, 6.

⁴ Cic. Ver. 1, 45.

⁵ Ulp. Frag. 23, § 6.

⁶ Id. 28, § 13.

⁷ If there exist an agnate or cognate.

law principles, either as being *nullum inofficiosum ruptum* or *irritum*; and the question arises, hereupon, as to how far the prætor will perform the promise of assistance held out by his edict as in favor of a testament invalid by the civil law. Now, should this be a case of a *posthumus*, who by his birth had rendered the will *ruptum*, dying before the father, or of a second will, since destroyed, superseding a first,¹ the *B. P.* is operative, but it is otherwise not.

B. P. might, secondly, be obtained under a condition then not fulfilled, or before the inheritance has accrued in law, since another may ultimately be found *strictæ juris* nearer in degree; or by a *substitutus*, notwithstanding the existence of an instituted heir, who, from some cause or other, does not administer. Again, *B. P.* will be granted in the case of a *conditio pendens*, *casualis*, or *mixta*, on caution being given to surrender the estate failing the performance or accretion of such condition. The petitioner must likewise give security for the performance of an affirmative possible condition, which it is not in his power to fulfil immediately.² In all these cases the *B. P.* will be *sine re* if such petitioner be subsequently ousted, by another claimant showing a superior title, or by non-fulfilment of the condition, but *cum re* if otherwise.

Lastly, when a disinherited *non suus* had obtained *B. P. litis ordinandæ gratiâ*, and had thereupon instituted and lost his *querela inofficiosi testamenti*;³ here it is a mere preparatory process, and all depends upon the result of the suit, which, if he gain, he is a civil rather than a prætorian heir; but pending the dispute he is certainly *ab initio cum re*, but if he lose it *ab initio sine re*.⁴

§ 1397.

The *B. P. s. T.* is either *necessaria* or *utilis* only, and was granted—

1. On a will such as just before mentioned,⁵ duly executed before seven witnesses by a *pater familias*, being a Roman citizen; notwithstanding the strict legal style required the observance of the old form, *per æs et libram*; but it must be remarked that it is here only a question of written wills, for no *B. P. s. T.* was formerly given in cases of nuncupative testaments.⁶ The form of wills being, however, more recently settled by later enactments, this *B. P. s. T.* became obsolete.⁷

2. When a *posthumus suus* (one who has come under the testator's power after will made) who, nevertheless, died before the testator, and so rendered the testament *ruptum* by the civil law, has been passed over, the testament still remains *ruptum*. The prætor thereupon grants *B. P. s. T.*, for the party in whose favor it is vitiated no longer exists; but should such *posthumus* outlive the testator for ever so short a time, the prætor

*B. P. s. T. sub
condicione cum
et sine re.*

*B. P. litis ordi-
nandæ gratiâ.*

*B. P. secundum
tabulas.*

Granted to
remedy an in-
formal will:

in the case of
posthumus suus:

¹ Vid. § 1318, h. op.

² § 1265, h. op.

³ P. 37, 11, 2, § 1 & 5; Averan, interp.

lib. 1, c. 8, n. 17.

⁴ Glück, l. c. § 71, 6.

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⁵ § 1397, h. op.

⁶ C. 6, 13, 1. It would be an error of speech to pray administration as *written* of an oral will.

⁷ Westenberg, D. 37, 11, 14.

grants no relief. The *posthumus*, quoad the testament, must be born and die in the lifetime of the testator; for the prætor does not support the testament for one who dies after the testator's death, nor when such *posthumus* is born in the testator's lifetime and dies after him, because the *posthumus* is then *ipso jure* heir, and transmits the inheritance to his heirs.¹

where the will is nullum, or in case of præterition.

3. A will is *nullum*, if a son, born at the time it was made, be passed over; and it remained so by the civil law, if the son abstained from his paternal inheritance; the prætor, however, promises *B. P. s. T.*²

Where nullum by illegal agreement.

4. A testament was also *nullum*, even though a son passed over in it agree thereto, such agreements being illegal, hence no inheritance can be renounced in the testator's lifetime; here, the prætor gives the *B. P. s. T.*³

Where irritum.

5. A will once *irritum* remains so in almost all cases; but the prætor declares, that if the testator have suffered *capitis deminutio*, and subsequently and before his death be reinstated in his civil rights, or become again *sui juris*, the testament shall revive by *B. P. s. T.*⁴

Where there are two wills.

6. A subsequent testament revokes a prior one; nor will the destruction of such latter instrument revive it; in such case the prætor gives effect to the testator's evident intention by *B. P. s. T.*⁵

Where there are two wills of like date.

7. Where two wills bear the same date, and it is not possible to discover which is the more recent, the civil law declares both void; but the prætor gives *B. P. s. T.* by both.

Where the heir is instituted under condition.

8. If an heir be instituted under an affirmative condition, to which he cannot at once conform, or which is not within his power, he can pray *B. P.* empowering him to administer as curator in the mean time, on giving caution or security to redeliver, if the condition be not fulfilled.

Where the Roman law is now administered, all these are practised except the fifth.⁶

§ 1398.

B. P. contra tabulas.

Bonorum possessio contra tabulas is also *necessaria* and *utilis*, and is granted—

Granted in case of præterition.

1. To children passed over in the will of their parent, but not formally disinherited; to *sui* (*i. e.* males) it is generally of no advantage, the civil law supplying a remedy; and by the Novella,⁷ the *emancipati* are not confined to this remedy alone.

In case of the præterition of patrons.

2. The patron in case of his *libertus*;⁸ and

¹ Vinn. ad I. 3, 10, § 6, n. 2.

² P. 28, 3, 12 & 17; Vinn. ad I. 2, 13, n. 7; Averan, l. c. c. 10, 11; there is no trace of the *B. P. s. T.* being granted to a son passed over, who died before the testator; Struve, rechtl. Bed. 1, B. 313, s.; Koch, B. P. p. 362, 373, 448.

³ P. 37, 11, 2, pr. No case occurs in which the son did so agree, and in which the prætor supported the will, vid. Höpfner ad Hein. § 660, n. 9. And this is reason-

able, for he would be taking advantage of his own illegal act.

⁴ P. 2, 17, 6.

⁵ P. 37, 11, 11, § 2.

⁶ Contii, tract. de H. et B. P. in opp. p. 281; Stryk. l. c. § 1, seq.; Reinharth ad Christin. vol. 4, obs. 1, seq.; Turin, diss. de B. P. § 7, seq.

⁷ Nov. 115, 4.

⁸ P. 38, 2, 1, § 2; P. 38, 2, 2, pr.; P. 38, 2, 3, § 10.

3. The father, in the case of his emancipated sons¹ passing him over as their *emancipator*, can demand and obtain the *B. P. c. T.*

If the son have instituted an infamous person, the father can upset the whole testament; but if otherwise, then only so far as his *pars legitima*² is concerned; nevertheless, it would seem that the *querela inofficiosi testamenti* is competent to the father in his paternal capacity, and in such case the *B. P. c. T.* is superseded by the Novella 115, 4, which gives the remedy by a suit of nullity or *inofficiosi testamenti*, at choice.

Now, if a son who is passed over in a will against which another son is instituted together with a stranger, decline to bring his *querela I. T.*, the son who is instituted can, in his brother's name, demand the *B. P. c. T.* to exclude the stranger instituted with him, and so acquire the whole inheritance.³

Again, if a father institute his two children and a stranger, and then have a *posthumus*, the testament is *ruptum*; but if such *posthumus* die before the testator, the children instituted must, nevertheless, demand the *B. P. c. T.* in order to exclude the stranger.⁴ In both these cases, the prætor grants *B. P. s. T.*; but he also grants it *c. T.* for the benefit of the children, but if they do not pray it, or have let the legal term elapse, the stranger instituted, conjointly with them, may have his *B. P. s. T.*; because, if a testator leave two wills, whereof in the first, *jure factum*, he disinherit his son in due legal form; and in the second, which is *imperfectum*, he pass him over; such son may obtain *B. P. c. T.* against the second testament, but only when the heir instituted is capable of the inheritance *remoto filio*, for in that case, the first will is considered as superseded by the second:⁵ and this is true, if a relation be instituted, who, failing the son, would inherit *ab intestato*, for the valid testament would not be superseded by the second and imperfect one; consequently, the disinheritance of the son would subsist.⁶

Of fathers and their emancipated sons. When the whole, and when part of the will is bad.

Of one of two sons instituted with a stranger.

Of two sons instituted with a stranger.

B. P. granted, though the legal terms have elapsed.

§ 1399.

Justinian,⁷ in addition to the *B. P. secundum* and *contra tabulas* just mentioned, which refer to testamentary successions, enumerates eight other ordinary kinds referring to intestate inheritances, of which the first four alone were allowed by Justinian to remain in force;⁸ these are—

1. *Ex edicto unde liberi*.⁹ 2. *Unde legitimi*.¹⁰ 3. *Unde cognati*.¹¹ 4. *Unde vir et uxor*.¹²

Those no longer in use are—

B. P. ab intestato were formerly eight in number.

¹ Nov. 115, 4.

² § 1313, 1314, h. op.

³ P. 37, 4, 3, § 10 & 11, § 4; Id. 10.

⁴ P. 37, 4, 3, § 11 & 4, § 3.

⁵ P. 37, 4, 12, § 1.

⁶ Koch, B. P. ad P. 12, § 1; P. 37, 5, 1, pr.; C. 6, 20, 17; De tit. pro contra, C. 6, 28, 4; Aeveran, interp. I. 2; Hofacker,

Prin. I. C. § 1639; sed vide Glück, l. c. § 8, 66, p. 29; Koch, l. c. § 8, p. 124.

⁷ I. 3, 10, § 1.

⁸ I. 3, 10, § 4.

⁹ P. 38, 6; C. 6, 14.

¹⁰ P. 38, 7; C. 6, 15.

¹¹ P. 38, 8; C. 6, 15, 5.

¹² P. 38, 11; C. 6, 18.

5. *Ex edicto unde decem personæ.* 6. *Tanquam ex familiâ.*¹
 7. *Unde patroni.*² 8. *Unde cognati manumissoris.*³

With respect to those before alluded to under the term of *extraordinarium auxilium ex legibus senatus consultis et constitutionibus principum*;⁴ Vinnius reckons them among the *B. P. P. ex Sct. Carboniano*,⁵ *ventris nomine*, &c., which are *temporales*.

On reference to the edict it will be seen that the prætor first calls in the *emancipati* with the *sui*; failing whom, the *agnati* in order of proximity, then the *cognati* according to the same rule, and lastly, the *vir et uxor*.

§ 1400.

B. P. ex ed.
unde liberi.

B. P. ex edicto unde liberi, can be taken advantage of by the *emancipati* and the *sui*, if they wish it; for although they have no need of it, yet the prætor gives it them if they prayed it; and as, according to the Novella, the *emancipati* inherit as well as the *sui*, they now require no *B. P.* except when—

1. A grandson repudiates his father's inheritance, and yet wishes to succede to the grandfather, who died before his father; or,—

2. When a grandson wishes to succede to his grandfather, whose father had repudiated the grand-paternal heritage.⁶ The effect being to release the grandchildren from the paternal debts.

§ 1401.

B. P. ex ed.
unde legitimi.

B. P. ex edicto unde legitimi. By this edict the agnates⁷ and all others who, although they had a civil law right of action, or *successio civilis*, are allowed the *B. P. utilis*: why, the commentators are not agreed; some supposing, that as the *sui* have it, the *legitimi* should not be excluded from it; others, because more than one recourse ought to be open to them; others, again, because the remedy is more speedy and simple by *interdicto quorum bonorum* than the mode by cretion, or *quia justius possidere videtur, qui auctore prætoris possidet*; perhaps, also, because *B. P.* gives a *tempus utile* within which they can sue.⁸

§ 1402.

B. P. ex ed.
unde cognati.

B. P. ex edicto unde cognati gave the cognates a remedy, failing agnates within the sixth degree, and arises out of Justinian's decree, because the cognates are not *hæredes necessarii*.⁹

The edictum
successorium.

The prætors published, in addition to all these remedies, an edict called *successorium*, comprising the whole law of prætorian succession generally, but particularly promising succession to those to whom he granted the *B. P.* The order of succession we have seen was *ordo graduum* or *de capite in caput*; in the first

¹ Ulp. Frag. 27, 7.

² C. 6, 13..

³ Basil, torn. 6, p. 595.

⁴ I. 3, 10, § 3.

⁵ Cn. Papyrius Carbo was the colleague of C. Cæcil. Metellus Caprarius in the consulship, A.U.C. 640, and again in 668 and 669, of L. Cornelius Cinna, vide Fasti Con. et Val. Max. 5 & 6, 1, 13.

⁶ C. 6, 14, fin.; P. 38, 6, 5, 2; C. 8, 18, 5; Höpfner ad Hein. § 662, n. 1, 2, § 4 & 3.

⁷ Hoppius ad I. 3, 10, § 1; Koch, B. P. § 13; Pothier, Pand. Just. tit. unde leg. n. 1; Glück, Intest. Erb. § 77.

⁸ Balduinus Merillius, Vinn. I. 3, 10, pr.; Huber, prat. ibid.; Koch, B. P. § 29,

⁹ Koch, l. c. § 14, 157; Glück, § 9.

of these, if the person to whom the succession is granted will not pray the *B. P.*, or do not do so within the time allowed, the next class is admitted, *sequens ordo succedit in locum prioris*; and this may happen, firstly, when in the previous *ordo* no one capable of succession is found; or, secondly, when the previous *ordo* declines the inheritance, or dies before transmission to his heirs. The first case is acknowledged by the civil law, but not the latter; for if a *suus* decline, neither the *adgnati* nor the *gentiles*, if the *agnati* decline, succede, but the *ærarium* or *fiscus*, for *in legitimis hæreditatibus successio non est*.¹ Hence the remedy supplied by the prætor in a succession of classes, by a claim of *P. B. ex edicto unde liberi*; and if this be refused, then *ex edicto unde legitimi*, and so on:² by these means a man could, moreover, succede, as it were, to himself, *defunctis suis existantibus hæredibus et abstinentibus vel repudiantibus hæreditatem frater jure consanguinitatis succedere potest*; thus, if a *suus* make an error as to the term for demanding the *B. P.*, he can succede as a *legitimus* or *adgnatus*; and if he have let this term also pass, as a *cognatus*.³

The *successio graduum* consists in the power the next in degree has of claiming, as of the degree next in order, when he has allowed the term for claiming the *B. P.* in virtue of his own degree to pass, on the principle, that *sequens gradus succedit in locum prioris*.

B. P. affected by the *successio graduum*.

The old law did not recognise this, though the prætor admitted it; but it is erroneous to suppose that he adopted as his rule the *ordo intestati*.⁴ For the prætors made no alteration as to the first class of children,⁵ nor indeed in the second, *ordo adgnatorum*, in fact; for the next agnate was admitted, nevertheless, not as agnate, but as cognate: but in the third, that of the cognates, if the next heir do not pray *B. P.*, the next in order to him had the *successio graduum*; ⁶ but by Justinian's decrees, the *B. P.* is admissible in all the classes of legal heirs.⁷

The prætors did adopt the *ordo intestati* in cases of B. P.

The prætor then extended the old law of intestacy in giving such persons the *B. P.* as could not inherit at all by law; or, setting the law aside, by this edictal succession.

§ 1403.

B. P. ex edicto unde vir et uxor is given, in default of relations of the deceased, to the surviving husband or wife duly married, and continuing so up to the testator's death.

B. P. ex ed. unde vir et uxor.

§ 1404.

Let us now review the difference between the civil and prætorian succession.

First. They differ from each other in respect of the order. By

Review of the differences between the civil and prætorian succession:—

¹ Paul. R. S. 6, 8, § 23; Ulp. Frag. 26, 5.

² C. 6, 57, 6. Koch terms this the *successio ordinum prætoria*.

³ P. 38, 9, 1, § 10 & 11.

⁴ Glück, l. c. § 85.

⁵ P. 37, 4, 4, § 1; P. 38, 15, 1, § 8; P. 38, 6, 7, pr. & 5, § 2.

⁶ P. 3, 2, 7; P. 38, 9, 1, § 6, 10; C. 6, 16, 1, 2; Vinn. ad l. 3, 10, § 4.

⁷ l. 3, 2, § 7; Nov. 118, 1; Koch, l. c. p. 286, et succem. ab intest. § 102.

firstly, in respect of the order ; the civil law, intestate succession cannot take place so long as there is a possibility of succeeding in virtue of a testamentary disposition. From this the prætors make an exception by granting emancipated children, passed over in the testament, *B. P. c. T.* ; giving the *B. P. s. T.* then only when they have not claimed the *B. P.*, or had let the legal term elapse.

secondly, of the persons ; Secondly. The *B. P.* differs from the civil law in respect of the persons who can claim it ; and the prætor gives the *B. P.* as well *secundum* as *contra tabulas*, either in the case of a will invalid by the civil law, or where some civil impediment prevents the administration of the heir.

thirdly, in respect of time ; Thirdly. They differ in respect of time. Generally, there is no limit to the administration of an inheritance by the civil law when no repudiation has taken place ; but the *B. P.* must be prayed within a year, or within one hundred days, as the case may be.

fourthly, in respect of creation ; Fourthly. In respect to the creation ; before an inheritance is *delata*, it cannot by law be administered to ; not so the *B. P.*, which can be prayed, *pendente conditione*, when another is nearer in degree ; and a *substitutus*, too, may pray it before it is known whether the *institutus* will or will not administer. And this is constant when the order actually reaches him, as a recognition of the *B. P.* at the proper time ; but he, of course, does not then receive the inheritance.¹

fifthly, in respect of the authority ; Fifthly. In respect of the authority : thus, according to law a slave cannot administer to an inheritance without his master's previous authority ; according to the *B. P.* the subsequent concurrence of the master suffices.

sixthly, of manner ; Sixthly. In respect of the manner : by the civil law administration must be personal ; but the *B. P.* may be prayed by a tutor or curator.

seventhly, of operation ; Seventhly. In respect of the operation : thus, the civil law vests an inheritance *ipso jure* ; but the court must be moved for *B. P.*²

eighthly, of form ; Eighthly. In respect of the form : the civil law admits extra judicial administration ; but *B. P.* must be obtained judicially (*coram magistratu petenda, accipienda, agnoscenda, amplectenda est*).³

ninthly, of effect. Ninthly. In respect of the effect : *B. P.* is necessary to the *interdictum quorum bonorum* ; but it is doubtful whether civil heirs have this remedy even equitably (*utiliter*).⁴

§ 1405.

The four obsolete edicts :—*B. P. ex ed. unde decem personæ*.

In addition to these four were those that became obsolete, to-wit,—*B. P. ex edicto unde decem personæ*, meaning those persons who followed next in order after the *legitimi*. Under these circumstances, the *liberi*, we have seen, had the first claim, then the

¹ C. 6, 9, 9.

² C. 6, 14, 3.

³ Constantine abolished the solemn form, C. Vinn. ad I. 3, 10, § 7 ; judicial *agnitio* appears necessary, Koch, *B. P.* § 6, p. 68, etc.

⁴ Koch, l. c. § 29, p. 338 ; et vide Donell, in Com. I. C. l. 7, c. 14, whence the above is abstracted, vide original, in extenso.

legitimi, or agnates, by the law of the Twelve Tables. Now, these were not only the agnates by blood, but might be an *extraneus*, in his capacity of manumittor of a son sold *per æs et libram*, where no fiduciary agreement was interposed by the natural father; by which neglect the *extraneus* would acquire the *jus patronatûs*. Now, as it was considered unjust that such person should have preference before blood relations, the prætor interposed by this edict, preferring ten persons before him; who were the *pater*, *mater*, *avus*, *avia*, on the paternal and maternal sides; the *filius*, *filia*, *nepos*, *neptis*, by a son or daughter; the *frater* and *soror*, either *consanguinei* or *uterini*. There is no mention of this edict in the Pandects,¹ the form of manumission having been changed by Justinian, which renders it obsolete.

§ 1406.

B. P. ex edicto tanquam ex familiâ, otherwise *tum quem ex familiâ*, by which are meant the *agnati patroni*, who, by the Twelve Tables, had no succession in the goods of the *libertus*.²

B. P. ex ed. tanquam ex familia.

§ 1407.

B. P. ex edicto pro patronis granted succession to the *liberi emancipati et in adoptionem dati nec non patronorum parentes*;³ this also the new regulations of Justinian rendered unnecessary.

B. P. ex ed. pro patronis.

§ 1408.

B. P. ex edicto unde cognati manumissoris. The emperor, in the constitution *de successione libertorum*,⁴ decrees that the manumittor of the father, together with his agnates and cognates, ergo the patron of a patron, although he was a *libertinus*, should succede to the goods of the son.

B. P. ex ed. unde cognati manumissoris.

§ 1409.

The original sequence, then, of the ante-Justinian edicts⁵ was,—

The original sequence of the edicts.

Ex edicto unde *liberi*.

- „ unde *legitimi*.
- „ unde decem personæ.
- „ unde *cognati*.
- „ unde tanquam ex familiâ.
- „ pro patronis.
- „ unde *vir et uxor*.
- „ unde cognati manumissoris.

The benefits granted by the prætor extended, therefore, formerly to the eight cases here above detailed, and failing provisions of law and these prætorian extensions; or in cases where no advantage

¹ Val. Max. 2, 7, 5.

² Ulp. Frag. 28, 7.

³ Theo. ad l. 3, 10, 1; Schulting, Jurispr. vet. antejust. p. 673.

⁴ Bas. tom. 6, p. 595.

⁵ Those in italics are existent, the others are superseded and obsolete.

was taken thereof, the *hereditas* was *caduca*, and fell first to the *licitum collegium*, if the deceased was a member of one,¹ and failing such quasi heir, to the *ærarium*, or public treasury,² which represented the nation at large, but which was, nevertheless, bound to pay all creditors.³ In later times, especially those of Hadrian,⁴ the *fiscus* took many *bona caduca*; an example of one of the modes whereby the emperors gradually increased their autocracy, by transferring the public revenues to their own private account. This half measure Antonius Bassus Caracalla⁵ rendered a whole one, claiming all *bona caduca* for the *fiscus*, or private imperial exchequer.⁶

§ 1410.

B. P. *decretalis*.

The *B. P. decretalis* is granted by the prætor sometimes, upon hearing the cause whereupon he doth *decree*; not that any one shall succede to the inheritance of the deceased, but only that he shall have a temporary right of possession, hence called *temporalis*, till it can be ascertained whether the case alleged be true or not. Thus, if one die leaving his widow in fact, or supposed to be, with child, whose issue would, had he been born before the father's death, have been legally the heir, the widow obtains *B. P.*

Ventricis nomine.

ventris nomine until it be seen whether she be with child or not, and whether the *fœtus in utero* be born alive,⁷ or otherwise. Hereupon a *curator ventris* is appointed, who makes his inventory of the inheritance, administers the property, supplies the widow with necessaries, in the shape of board and lodging,⁸ until she be delivered, or prove not to be with child. Or, if one dying leave his child a minor, generally reputed to have been legitimate, but which fact is now questioned by the relations, such child may pray the possession of the paternal property until it be of age, offering to join issue on the point of fact with the claiming relations so soon as it shall come of full age; or an emancipated son, who is either disinherited or passed over, that he may have time to try the testament as inofficious,—this is especially termed *ex Scto. Carboniano*.⁹

In the case of questionable legitimacy;

of a minor;
of an emancipated son passed over.

§ 1411.

The imperial or extraordinary
B. B. P. P.

It has been premised that the emperors in later times, imitating the example of the prætor, gave *B. B. P. P.*, called extraordinary; thus Adrian, by a constitution, granted relief by these means to the relations of a soldier who had been condemned to death for a military offence. Thus, the difference between these and the

¹ C. 6, 62, t.t.² Ulp. Frag. 28, 7; P. 49, 14, 21; P. 49, 14, 13, pr. & 15, § 3.³ P. 49, 14, 11.⁴ P. 5, 3, 20, § 6.⁵ Schulting, Jurispr. vet. antejust. p. 617.⁶ Ulp. Frag. 27, 2.⁷ P. 37, 9, 1 & 5.⁸ Stryk. tract. de succ. ab intest. dis. ix.⁹ Sed quære, is there any difference between *B. P. edictalis* and *decretalis*? P. 38,

9, 1, § 7; P. 38, 6, § 4; P. 29, 2, 30, § 1; P. 37, 10, 1 & 8. Some assert the first is *sine causæ cognitione* before, and the latter *cum causæ cognitione* after hearing, Vinn. ad I. 3, 10, § 3. But Heinec. ad Vinn. l. c., Koch, B. P. § 6, Glück, intest. succ. § 70, thinks edictal means perpetual, and decretal temporal, vide et Giphanius, in expl. diff. LL. eod. tom. 2, p. 16 (Colon. 16, 14, 4); P. 37, 10, 3, § ult.

prætorian *B. P.* consisted in this, that the prætorian applied to all cases, and to the whole *genus*, being a general extension of the law of succession applicable to all persons, the imperial and legal *B. P.* merely to certain cases and classes of persons.

§ 1412.

A *tempus utile*, which, in cases of parents and children, is a year, and for other persons one hundred days, is allowed for applying for the *B. P.*; if, however, they respectively let these periods pass, the next in order can pray possession. The term is divided into *tempus utile* and *tempus continuum*. The latter is reckoned from the period at which the circumstance occurred, which gave the right to petition, whether the party were then cognizant thereof or not; this is termed *tempus continuum ratione initii*. The former date only from the time at which the party was cognizant of the fact, and in a position to prosecute his right; called *tempus utile ratione initii*.

The rule of the tempora, and terms allowed.

Tempus utile et continuum.

Ratione initii.

Thus, the *hæreditatis petitio civilis* has thirty years to run from the day of the testator's death, when the inheritance falls in to the heir, whether he be aware of these facts or not; these thirty years form a *tempus continuum ratione initii*. On the other hand, the term within which the *B. P.* must be prayed is *tempus utile ratione initii*, because it begins to run from the death of the deceased, and the fact that he has a right to the *B. P.* becoming known to the claimant; whence it results that recourse may be had to *B. P.* when the term for bringing the *hæreditatis petitio* by the civil¹ law has elapsed. On the other hand, if one obtain the *B. P.*, and the civil heir have let the term pass, he may claim the inheritance by *B. P.*, and the *B. P.* of the former party becomes *sine re*.

Limitations of actions and extension of terms.

In the *tempus continuum ratione cursus* all days are included, whether *fasti* or *nefasti*, business days, holidays, or days of absence; but *tempus utile ratione cursus* included only business days. Now, an *actio de hæreditate petendâ* must be brought within thirty years, 365 days being reckoned to the year, and all days, business or holidays, or days of absence, are included. This, then, is a *tempus continuum ratione cursus*, or time continuous in its lapse; but the 100 days within which *B. P.* must be prayed is a *tempus utile ratione cursus*, or time incontinuous in its lapse, because court days only are available. Hence this latter is doubly *utile*; firstly, in respect of its *initium*, and secondly, in respect of its *cursus*; but these may be combined, for a *tempus* may be *utile* as to its commencement, and *continuum* as to its lapse, or *continuum* as to commencement, and *utile* as to lapse.²

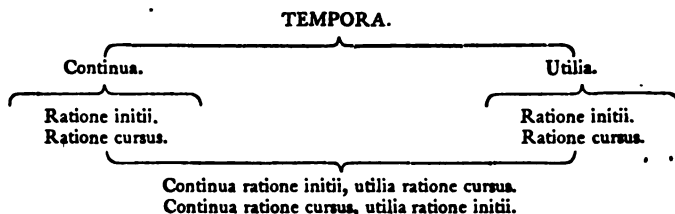
In temp. cont. ratione cursus all days are included.

In temp. util. dies fasti only.

¹ Reinhardt ad Christin, vol. 4, obs. 7; Koch, succ. ab intest. § 130; sed vide I. ejusd. B. P. § 29 fin. p. 342; Glück. v. d. Int. Erba. § 82, p. 227.

² P. 44, 3, 1, 2; P. 38, 15, 2, pr. 1 & 2; P. 37, 1, 10; C. 6, 9, 6; Glück, Pand. vol. 3, p. 496; Koch, succ. ab intest. § 128-9; Glück, ibid. § 82; I. 3, 10, 5; Koch, B. P. § 6, p. 71.

Table of the
tempora.



Koch's view of
the *jus succes-*
sorium hæredi-
tarium.

Koch proves that the more recent constitutions of Justinian did not supersede the *B. P.*, but merely transferred it to the *jus successorium hæreditarium* in some respects; it, therefore, still forms a part of the Roman law *in complexu*, and is consequently applicable in countries where the Roman law and system is yet preserved.¹

§ 1413.

Jurisdiction over
wills in England
was in the
County Court.

The jurisdiction over wills in England before any ecclesiastical jurisdiction existed, belonged to the County Court, or to the Court Baron of the Manor where the testator died, as all other matters did; and the power of the probate still exists in certain manors, as in those of Mansfield, and of Cowle and Caversham, in Oxfordshire, where it has been enjoyed time out of mind and uninterruptedly; it is still held to be valid, and precludes the bishop from interference.

Bishop sat with
the earl.

William I. se-
parated them.

The earl was the president of the County Court;² but when Christianity was introduced into Britain, the bishop sat with the earl. William I., however, separated the jurisdiction; after which time the bishops appear gradually to have usurped authority over wills, though deprived of their seat in the County Court.

The Roman
law prohibited
bishops from
meddling with
the probate of
wills.
The collegium
pontificum.

The Roman law—although it enables bishops or their superiors to maintain suits for legacies left *in pios usus*, such as the support of the poor, the redemption of captives,³ &c.—prohibits them from proving or registering wills, whence it appears that they had even then endeavoured to usurp that jurisdiction.⁴ In like manner, the *collegium pontificum* of Rome, in the ante-Christian times, could compel an heir to perform the will of the deceased in the case of a monument to be erected, though no action was given by the civil law.⁵

Administration
in England re-
sembles *B. P.*
Usurpation of
the clergy.

Administration of the goods of the deceased in England resembles in some measure the *B. P.* of the Roman law. After the Norman conquest, the ordinary obtained confirmation of the usurped right of absolute disposal of intestate's effects,⁶ under the

¹ Koch, succ. ab intest. § 131, et *B. P.* § 30, quem vide.

² § 119, h. op. for origin of County Court.

³ *C.* 1, 3, 28.

⁴ *C.* 1, 3, 41; *C.* 6, 23, 33.

⁵ *P.* 5, 3, 50.

⁶ Before 13 Ed. I. st. 1, c. 19—Whereas, after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the ordinary to be dis-

posed; the ordinary from thenceforth shall be bound to answer the debts, as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament.

The Magna Charta of John, the object of which was to protect the barons against the priesthood as well as against the king, also provides against this clerical robbery.

fiction that he disposed of them *in pios usus pro salute animæ defuncti*; thus defrauding widows and orphans of their patrimony, and creditors of their due rights.

The king, however, had a first lien before all other creditors,¹ but, it would appear, no more; at present the ordinary must, by the above statute, depute to the next and most lawful friends of the deceased to administer his goods, such being his next of blood, who are not attainted of treason, felony, or have other lawful disability.²

First lien of the crown.

Where a man dies intestate, or his executors refuse to prove the will, administration is granted "to the widow of the same person deceased, or to the next of kin, or to both, as by the discretion of the same ordinary shall be thought good:"³ thus, where there are claimants of equal degree, the ordinary may elect; but if not of equal degree, then the widow, and whom of the petitioners the ordinary may please. If the next of kin refuse, administration is grantable—not by statute, but by the old law—to the creditor; on which account, the ordinary may insist upon whatever bond he please, as between such and other creditors.

Administration to next and most lawful friend, by the widow—

to creditors;

The goods of bastards, dying unmarried and without issue, fall to the king, and the ordinary must grant his patentee probate;⁴ but here, a sort of *B. P.* is practised: he who would have been the next heir, if the deceased had been legitimate, procures a grant *ex speciali gratiâ* from the crown, and the ordinary grants administration, as of course, to such person.

to the crown;
to the patentee;

Where the executors refuse to administer, the ordinary grants administration *cum testamento annexo*, or with will annexed; this is a *B. P. s. T.* to prevent the will becoming *destitutum*.

Administration cum testamento annexo, or *B. P. s. T.* *B. P. c. T.* no exact parallel in England.

The *B. P. c. T.* has hardly any parallel in England, the *pars falcidia* not being recognised, save in the case of dower; it therefore can only be granted by Chancery, which will upset a will as inofficious, for some inherent vice, founded upon a real, but not on a fictitious insanity, such as that upon what the *querela inofficiosi testamenti* was granted. If the deceased before his death have alienated his property by a valid deed, the will is, of course, of none effect, for the deceased had nothing to leave; therefore, the only true *B. B. P. P.* in England are those *ab intestato* above mentioned, the claimants for which are regulated by the statute of distribution, and by the foregoing statutes.⁵

The querela inofficiosi test not fictitious in England.

The statute of distribution.

¹ 9 Co. 36; Mad. Exch. 237; Mag. Ch. c. 18; 2 Bac. Abr. 398.

² 9 Co. 40.

³ 21 Hen. VIII. c. 5.

⁴ 3 Peere Will. 33.

⁵ 22 & 23 Car. II. c. 10.

TITLE XV.

Modis Adquirendi Universales—Adquisitio per Adrogationem—Operæ Officiales—Fabriles vel Artificiales—Jus Agnationis—Jura Usus et Usufructus—Bonorum Addictio Libertatum Servandarum Causâ—Rescriptum Marci Antonii—Justiniani—Sectio sive Venditio Bonorum—Auctiones—Obætorum Penæ—De Debitoris Corpore in Partes Secando—Cessio Bonorum Justiniane—Senatus Consultum Claudianum—Bankruptcy and Insolvency.

§ 1414.

Adquisitio per adrogatione.

ACQUISITION of property by arrogation is the third *modus acquirendi universalis*,—the nature of arrogation itself has already been treated of in a preceding part of this work,¹ and consists in adopting a *pater familias*, or a man *sui juris*. A *filius familias* possessed no property of his own except his *peculium*, and all he acquired was acquired for his father; in like manner, a *pater arrogator* acquired the entire property of the arrogatee, nay, even also the possession of it, *ipso jure*, in virtue of the arrogation.² The arrogatee, however, could not transfer all his rights; inasmuch as some of them, called *personalissima*,³ were utterly lost by the *capitis deminutio* implied in the arrogation, and therefore fell to the ground.

Jura personalissima not transferable.

Among these were—

Operæ officiales lost.
Operæ artificiales not so.

1. The rights which the arrogatee had before arrogation in his capacity of patron to the *operæ officiales* of his *liberti*, but not those termed *operæ artificiales* or *fabriles*, which the patron acquired by promise confirmed by oath⁴ on the part of his *libertus*; for these latter are not among the natural duties of a *libertus* to his patron, who could sue him for non-performance, the only case in which an action could be brought on a promise made on oath by the defendent; and it may here be useful to repeat that *operæ officiales* were such as contributed to the dignity of the patron, *operæ fabriles* or *artificiales* such as brought the patron profit.

Jus agnationis does not pass to the adrogator;

2. The *jus agnationis* does not pass with the arrogatee to the arrogator, that is, the right of succession which the *adrogatus* had as an agnate of his natural family.

nor the jura usus et usufructus;

3. The *jura usus et usufructus* belonging to the *adrogatus* did not pass to the adrogator⁵ by the old law. Neither did the

¹ § 688, h. op.

² Vinn. ad I. 3, 11, § 1, n. 1.

³ I. 3, 11, § 1.

⁴ Brissonius, de verb. sig. voc. stipulari.

⁵ Paul. recept. gent. 3, 6, 39; P. 4, 5, 7; P. 7, 4, 1; I. 3, 11, § 1.

adrogator assume the liabilities of the *adrogatus*, such being a *personallissimum quid*; and no one could be made responsible, *actione personale*, but he who contracted the obligation or his heir.

nor the liabilities of the *adrogatus*.

§ 1415.

Justinian thought proper to change much of this, and consequently decreed that the arrogator should only acquire an usufruct in the property of the arrogatee, who retained the *dominion*; for, inasmuch as the natural father¹ had no longer any claim on the *peculium adventitium* of the son under power, such privilege cannot be given to an adopting or arrogating father; secondly, he gave power to creditors of the arrogatee, to compel the arrogator to deliver up the property of the former to them, in satisfaction of debt.

Justinian's change as to usufruct,

and peculium adventitium.

§ 1416.

The fourth *modus acquirendi* is *per bonorum additionem libertatum servandarum causâ*, originally, as has been already seen;² if a will in which liberty was conferred on a slave became *destitutum* by the heirs repudiating, or from other cause not administering thereto, such slave lost the liberty intended for him.³

Addictio bonorum libertatum servandarum causâ.

To remedy this inconvenience and injustice, Marcus Antonius published a rescript, to the intent that, in case there should be no testamentary heir or heir-at-law, the inheritance should be addicted over to one or more of the slaves of the deceased to whom their liberty had been left directly or in trust, as *quasi bonorum possessori*, upon such addicted heir undertaking⁴ and giving security to pay the creditors of the deceased capital and interest, whereby the character of the deceased was rescued from obloquy. As regarded those whom the heir was requested to manumit, they obtained such liberty from the slave to whom the goods had been addicted, who, if he had previously agreed with those *fidei commissary* freedmen that he would administer, on condition of retaining over them the *jus patronatûs* belonging to the fiduciary heir over others freed, directly or in trust, such agreement by him was to stand good by the rescript. With regard to the escheat to the imperial exchequer, *fiscus*, the officers thereof are ordered so to manage matters that the liberty of the person shall not be infringed, but that it be preferred before pecuniary considerations; in other respects, everything to take the same course as if the inheritance had been regularly entered on.⁵

B. P. to a slave l. a. c. by rescript of M. Antonius.

As to the *jus patronatûs*.

As to the *fiscus*.

In subsequent times the decree received some extension, thus creditors or other persons, besides slaves inheriting freedom, are allowed on petition to enter upon the inheritance upon the same conditions as the above,⁶ as is now the case in England.⁷

As to creditors.

¹ I. 3, 11, § 2.

² § 439, 1249, 1320, h. op.

³ C. 7, 2, 2; C. 7, 4, 1.

⁴ C. 7, 4, 4, § 21. ⁵ I. 3, 11, 1.

⁶ Westenberg in D. Marco, diss. 78; Schaumburg, ad const. imp. aut. man. 14, obs. 4; Zippnick, diss. de test. dest. irrit. § 17, et seq.

⁷ § 1414, h. op.

Justinian's additions.

To these provisions, Justinian, as was his wont, added some conditions; to-wit, that the right of demanding the addiction of goods should be annual;—that if many persons applied simultaneously, offering security, the goods should be addicted to them altogether;—that preference should be given to him who promised most;—that he who offered a larger dividend within the year (formerly it was *in solido*) than another to whom the goods were addicted, should obtain the goods, the other retaining his liberty.¹

§ 1417.

Sectio sive venditio bonorum.

Sectio a judicial auction.

Auctio hæreditaria.

Origin of auctiones venditiones sub hastâ.

Cicero's description of a judicial sale.

The fifth universal mode of acquiring property was by *sectione sive venditione bonorum*. *Secare* signified, in the earlier times, to sell by auction; *sectio*, the substantive, signifying such auction where the things sold were divided among the bidders (*emptores*) according as they bid (*licebant*), and to whom they were knocked down (*addicebantur*); from the practice of increasing on the price, they came to be called *auctiones*, from *augeo*; thus we find the term *auctio hæreditaria* is a general term for all sales of this species by which the quiritian ownership was transferred, and upon usucapion a right to sue acquired. The first auctions appear to have been held on the field of battle, where a spear was raised in token that the plunder had been taken in war,—hence the term *sub hastâ vendere* and *ἀρχμαλώροι* applied to prisoners of war sold as slaves, whom the Romans called *hastati*. It was the business of the *præco*, or *crier*, to repeat aloud the bids, and puff the thing put up for sale, after the manner of an auctioneer; that of the *magister* or *argentarius* to collect, or take security for, and register payments. The suggestion may be, perhaps, ventured, that *auctio* originally applied more properly to the usual sales of goods; but that *sectio* more properly to a legal sale, by authority of some court of justice, as an execution, or as in the above case.

Cicero¹ gives us a description of such a sale in the following words, which it may be interesting to insert in this place:—*Cæsar Alexandriam se recepit, felix, ut sibi quidem videbatur; meâ autem sententiâ, si quis reipublicæ sit infelix, felix esse non potest. Hastâ positâ pro æde Jovis Statoris bona—bona inquam Cn. Pompeii Magni voci acerbissimæ subjecta præconis—expectantibus omnibus quisnam esset tam impius, tam demens, tam diis hominibusque hostis, qui ad illud scelus sectionis auderet accedere, inventus est nemo præter Antonium! Unus inventus est, qui id auderet, quod omnium fugisset, et formidasset audacia. Tantus igitur te stupor oppressit, vel ut verius dicam, tantus furor, primum, ut quum sector sis isto loco natus, deinde quum Pompeii sector, non te execrandum populo non detestabilem, non omnes tibi deos omnes homines et esse inimicos et futuros scias?*

¹ C. 7, 2.

² Cic. Phip. 2, 26.

§ 1418.

Heineccius¹ gives the following account of the execution on a debtor's person:—he says, the prætor having adjudged the debtor to a creditor, he could *in nervum ducere*, which may be interpreted as binding him, or putting him into prison, or under other restraint; hence, he remarks, debtors were called *obærat*i and *nexi*, also *addicti*, indebted, bound, or adjudged; but as *ingenuitas*, gentle blood, was not, *in commercio*, an object of trade, and therefore the debtor became not a slave, but was, nevertheless, condemned to perform many servile duties by the judgment of the prætor,—hence they were still *ingenui* on recovery of their suspended liberty. Servius Tullius is said to have introduced the *cessio bonorum* to restrain the cruelty of the nobility towards such *ingenui* as were indebted to them; this boon did not, however, long survive, being abrogated with other of Servius Tullius's laws by Tarquin.

Personal execution according to Heineccius. Restraint of person of debtor.

Ingenuitas suspended.

The decemviri decreed that thirty days grace should be given to confessed or judgment debtors, *æris confessi rebusve jure judicatis xxx. dies justi sunt*² (the thirty days were subsequently increased to two months,³ and extended to four by Justinian);⁴ *post deinde* continues the decemviral law *manus injectio esto, in jus ducito*, that is, for the prætor to adjudge him to his creditor; the next step was, *ni judicatum facit, aut qui locuples endo eo in jure vindicit, secum educito, vincito aut nervo aut compedibus xv. pondo ne majore, aut si volet minore vincito*, that is, if he neither paid nor procured sufficient security, he became a prisoner, and might be put in irons, *si volet suo vivito, ni suo vivit, qui em vinctum habebit libras farris endo dies dato si volet plus dato*; the debtor could therefore claim a certain alimony from his creditor, if he neither could nor would live at his own expense, *ni cum eo pacit LX. dies endo vinculis retineto, inter ibi trinis nundinis continuis in comitium procitato, ærisque æstimiam judicati prædicato, ast si pluribus erunt rei tertiis nundinis partes secanto. Si plus, minusve secuierunt se fraude esto*, and it is this passage which is supposed to refer to the death of the debtor, by a misapprehension of the word *seco*; first, it is by no means clear that these proceedings were not intended to force payment from an unwilling or fraudulent debtor who would not surrender his property, or perhaps, indeed, to induce his friends to come forward and give security for him. This resembles the proclamation to outlawry in England, in three successive county courts.

Twelve Tables gave thirty days grace to insolvents. Term extended to two, farther extended by Justinian to four months. Restraint of debts.

The debtor's alimony.

Proclamation of the insolvent.

§ 1419.

Bynkershoek,⁵ as well as others, interprets the law of the Twelve Tables, *debitorem obæratum creditores secanto*⁶ *trans Tiberim*, not to allude to killing the debtor, but to selling him, and

Bynkershoek's view of the sectio. The sale of the debtor.

¹ Hein. A. R. 3, 30, § 2, seq.

² Gell. N. A. 20, 1; Tertull. Apoll. iv. Quinct. Inst. 3, 6.

³ Cod. Theo. du usq. rei jud. l. un.

⁴ C. 5, 54, un.

⁵ C. pro Rosc. Am. 63; Acon. Prædian. od Cic. Verr. 3, p. 1843 & 1815; Flor. 2, 6; Varro de Re rust. 2, 10.

⁶ Obs. jur. rom. I. 1.

dividing the price. Nor can there be anything more absurd than supposing the creditors, like Shylock, could, except from private pique, have derived any satisfaction from their pounds of flesh *pro rata debitorum*.¹

Author's view
of the sale of
the goods only.

We may go yet further than Bynkershoek,² and infer from the passage and practice of the times, that simply the goods *corpus*³ of the debtor were seized in execution, sold, *secanto*, by auction, and divided among his creditors, on the other side of the Tiber, the place appointed for such sales, as not being within the city, because the old fiction was that they were sold on the field of battle; latterly, it is seen, a spear was put up before the temple of Jupiter Stator, where the Sabine forces were checked. It by no means appears that a Roman citizen could, in the age of the Twelve Tables, be reduced to slavery and sold, but rather the contrary; he was then fictitiously banished for the purpose.

Modification by
the Poetelian
Papyrian law.

The rigor of this decemviral law was, however, abated by the *Lex Poetelia Papyria*, introduced in A.U.C. 427, under the consulship of C. Poetelius Libo Visolus, and L. Papyrius Mugillanus, *ne quis, nisi qui noxam meruisset, donec pœnam lueret*, in compedibus aut in nervo teneretur; *pecuniæ creditæ bona debitoris non corpus obnoxium esset et nequis in posterum nectaretur*:⁴ here the word is *necto*, not *neco*, nor is any allusion made to the death of the debtor; from this period, then, the sale of goods alone was permitted. Since, however, the people continually demanded a new law on this subject,⁵

The new bank-
rupt law of
Julius Cæsar.

Julius Cæsar promulgated the following:—*Ut disjectâ novarum tabularum expectatione, quæ tam crebro movebatur, debitores creditoribus satis facerent per æstimationem possessionum, quanti quasque ante bellum comparassent, deductâ summâ æris alieni, si quis usuræ, nomine numeratum aut præscriptum fuisset*;⁶ this enabled debtors to have their estates valued and delivered to their creditors in satisfaction.

The cessio
bonorum.

The *cessio bonorum* was introduced by the same or another *lex Julia*,⁷ and consisted in the cession of goods by any party unable to pay to the creditor in satisfaction, if no fraud had been committed.

¹ A. Gellius, N. A. 20, 1, understands the *sectio* literally, and he is no mean authority; indeed, he is the originator of this view on the matter; but Gellius lived A. D. 130, or about six centuries after the law was obsolete, and it is presumable, therefore, that he knew no more of the practice than we do. It is possible that the vulgar error prevailed in his time, and was related as an instance of the severity of the first ages of Rome, brought by the decemvirs from Greece. Shakspeare possibly alludes to this in representing the alternative condition of Shylock's bond as he does, for he does not make Portia question the legality of the condition, had Shylock been a Christian. Shakspeare, therefore, considered this was

good Venetian law; whether it was or not is another question.

² I. H. de Randh, diss. de stat. con. et jur. deb. obser. apud Rom. in Céhrichts thesau. nov. diss. Belgicar, vol. 3, tom. 1, p. 299, seq.; vid. Dabelow, development of the concurrence of creditors (German), p. 46, etc. ed. Halle, 1801.

³ *FK Corpus* is often used to signify the property, in the same sense as *bona* and *facultates*, P. 5, 3, 25; P. 26, 7, 23.

⁴ Liv. 8, 28; Liv. 1; Ov. Fast. 6; Varro, L. L. 6, 5, p. m. 85; Tertull. Apolog. 4.

⁵ Senec. de Ben. 1, 4; Quint. Decl. 336; Sigon. de I. C. R. 1, 6, p. 96.

⁶ Suet. Jul. 42; Cæsar, De Bell. Civ. 3.

⁷ C. 7, 72, 1, 4; Cod. Theod. tit. qui bonis ex L. Jul. cedere possunt.

§ 1420.

A bankruptcy or insolvency, then, was conducted as follows:—When any one became insolvent, his creditors appointed a curator under the authority of the prætor,¹ who sold the *massa* or estate as it stood, consisting of active and passive debts, to some buyer who agreed to pay the whole or a certain per-centage on the amount, or their respective demands, such person became the *successor universalis* of the debtor.

At a subsequent period this became obsolete. Justinian is, however, very obscure upon this head, for he says,—*Sed cum extraordinariis judiciis posteritas usa est, ideo cum ipsis ordinariis judiciis etiam bonorum venditiones expiraverunt et tantamodo creditoribus datur officio iudicis bona possidere, et pro ut eis utile visum est, ea disponere.*

Hoppius explains this passage by stating, that formerly certain prætorian decrees were necessary to put the creditor into possession of the debtor's effects, the *magister* being appointed with power to sell, and the *curator*, with the consent of the creditors, for the distribution among them, *pro ratâ*: thus two *judicia extraordinaria* or decrees were required; *judicium extraordinarium* appears to have been, generally speaking, the judgment of the prætor, in point of law, upon facts,—to obtain which, he assigned a *iudex* to try the issue of fact, which was termed *ordinarium judicium*; thus Vinnius² adds, three applications must be made to the prætor: the first, *ut liceret bona possidere*; secondly, for the appointment of the master; and thirdly, for the sale and arrangement with the purchaser.

But as the law was finally fixed, and now stands, the *cessio bonorum*, or surrender of goods, is permitted to the debtor voluntarily or by order of the court; but if he do not within due time after confession of the debt *in jure* surrender, judgment may be taken against him, and execution issued,—such confession may be *in jure*, or by letter or message;³ the debtor who by misfortune in business has gotten into debt, but who cedes all his goods, is liberated for the time; he is bound to hand in an inventory, and swear that he had withheld nothing:⁴ but his wearing apparel, alimony, and even the usufruct of a legacy is often granted him out of humanity,⁵ nor can he be further troubled⁶ at that time; but if he come into property subsequently,⁷ he can be again distrained, till the creditors are paid, in the following order:—first, his moveables, then his immoveables, and lastly, his incorporeal rights are taken possession of; if, however, an insolvent think he can pay if

How a bankruptcy or insolvency was originally conducted: the creditor became successor universalis of debtor.

Justinian's observations on this having become obsolete.

Hoppius's view of this passage.

Two *judicia extraordinaria* required.

Vinnius's view of the *judicia extraordinaria*.

Voluntary act of bankruptcy by surrender.

The duties of the debtor as to inventory, &c. Things he was permitted to retain. His subsequently acquired property liable.

¹ Cic. Att. 6, et pro Publ. Quint. cap. 15 & 16, verb. *cujus bona venierunt*; Walch et Hopp. ad l. 3, § 12, p. 622; Dabelow, l. c. p. 99.

² Ad l. 3, § 13, n. 2.

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³ P. 42, 3, 9.

⁴ Nov. 135, 1, as in England.

⁵ P. 42, 3, 6.

⁶ P. 42, 3, 4, § 1.

⁷ P. 42, 3, 7.

An insolvent to have five years to pay on giving security. No distinction between bankruptcy and insolvency.

respired for a time, he obtains what is called the *flexibile auxilium et miserum ajutorium* or *rescriptum moratorium* introduced by Julius Cæsar, which allowed debtors a period, usually five years¹ time, to pay on giving security.² Thus the Roman law does not distinguish between bankruptcy and insolvency; nevertheless, the general provisions of the above law do not materially, in principle, differ from the English law of bankruptcy, and appears historically to have been exposed to far fewer changes by patching, enacting, repealing, and consolidating, than that of England. The Romans being evidently aware, that one of the laws most important to the prosperity of commerce ought to be permanent, and not rendered uncertain by constant meddling and interference.

§ 1421.

The S. C. Claudianum reducing free women to slavery for cohabiting with slaves,

abolished by Justinian.

The *senatus consultum Claudianum* ordains that, if a free woman illegally cohabited with a slave, whose master had thrice forbidden the connection, after which she had persisted, the judge was empowered to assign such free woman over to the slave's master as a slave,—whereby this latter acquired a property in her, and all that to her belonged.³ Justinian abolished this *modus acquirendi* which he calls *indignus suis temporibus*; and here Höpfner is inclined to doubt whether, by the above expression, the emperor intended to pay a compliment, or imply a satire on the age in which he lived.

§ 1422.

Successio ex speciali fundamento. Socius liberalitatis principis,

inherited after children.

Certain persons receive from the reigning prince a right of succession not founded on consanguinity,—these are termed *socii liberalitatis principis*, and arose when the emperor gave two persons together a thing jointly; as, for instance, a landed estate, and attached to it the inherent capacity of devolving on the survivor, in case the deceased had not disposed of his share before his death by will, and had left no relations who could inherit it *ab intestato*.⁴ *Ut si quis forte ex his, quibus communiter à nobis aliquid donatum sit, nullo hærede relicto, decesserit, ad consortem potius solatium, quam ad personam aliam, pars descendantis perveniat.*

It is, however, doubtful whether the *socius liberalitatis principis* inherit after all relations whatever, or immediately after the children. The law in the Codex is evidently founded on a law in the Codex Theodosianus,⁵ in which we read, *qui intestatus aut sine liberis diem defunctus est*, which Anian interprets, *si aliquis ex his*

¹ C. 1, 19, 2 & 4.

² This resembles the Ley. de Espera lately passed in Caracas; but which, being retrospective, and injuring foreign merchants, was repealed at the instance of foreign states.

³ C. 7, 24, un; I. 3, 13, § 1; Darnaud, lib. 1, conjec. c. 20; Burgii Elect. c. 8; Theas. otton. tom. 1, p. 322; Bach. hist. jurispr. Rom. I. 1, 3, § 21.

⁴ C. 6, 14, 1.

⁵ C. Th. 10, 14, 1 & 2.

*mortuus fuerit—et nec testamentum fecisse, nec filios reliquisse cognoscitur, placet ut portionem ejus socius adquirat.*¹

That this is not strictly a *jus accrescendi* is clear; it, nevertheless, may be placed with more propriety under that head than under any other. The *jus accrescendi*, it is true, ceases so soon as the co-legatee acquire his share;² it may, therefore, be termed an anomalous or bastard *jus accrescendi*.³

The soc. lib. prin. succeeded by a quasi *jus accrescendi*.

§ 1423.

Secondly, husbands and wives succede *ex speciali fundamento*. In the earlier ages of Rome, wives, for the most part, *venerunt in manum mariti*, and therefore succeeded as *sux hæredes*.⁴ But this was not the case with a wife not *in manu*, who had no intestate rights on her deceased husband's property, nor had he on hers, neither would the prætor even grant the survivor *bonorum possessionem ex edicto unde vir et uxor*; hence, as the *conventiones in manum* fell into desuetude, it was exceedingly seldom that the above circumstances arose, under which alone the prætor would grant the *B. P.*⁵

Of the special succession. Husband and wife inter se.

Justinian, therefore, amended this part of the law by new constitutions, to keep pace with the altered usages of society, decreeing that when the one of a married couple is rich and the other poor, of whom the latter survives, he or she shall receive a certain proportion of the property of the deceased, to the prejudice of relations, although in the nearest degree to the deceased. Hence, when the survivor is not poor or the deceased not rich, the old law remains in force, and the survivor inherits only in default of all relations, in virtue of the edict *unde vir et uxor*; but if the case provided for by Justinian do arise, then the survivor obtains a *pars legitima* together with the relations, but there is a considerable difference in the nature of his right; under the edict, the survivor is a real *hæres ab intestato*,⁶ with all rights and obligations thereunto attaching; but under Justinian's ordinance, he is no real heir, although so-called⁷ in the constitution, because he has no *jus accrescendi* and pays no legacies,⁸ but receives this share, *titulo speciali, ex beneficio legis*.⁹ He can be deprived of nothing by testament, but can claim his due *condictione ex lege* without the necessity of impugning the will in other respects; hence it is not a *legitima ordinaria*.¹⁰

Of Justinian's amendments.

¹ Mollenbec, diss. de imperial. lib. soc. c. 3, § 3, p. 17, seq.; but Rom. Teller, in progr. ad Richter, diss. de thesaur. a mercenar. invent. p. 10, seq.; Koch, de succ. ab intest. p. 163, thinks the socius lib. imp. comes after all relations.

² Amaya ad L. un. si lib. imp. soc. in opp. p. 122, seq.

³ P. 7, 2, 1, § 1 & 3, § 2.

⁴ § 600, h. op.; Glück, v. d. Intestaterbf. § 48 & 136, ibique cit.

⁵ Nov. 53 & 117.

⁶ Kohl, tr. de pact. dotal. part 2, n. 9, 3, seq.; Glück, l. c. § 143.

⁷ Nov. 53, c. 6, § 1.

⁸ Stryk. l. c. disp. 4, c. 1, § 26, seq.

⁹ Koch, l. c. § 113.

¹⁰ Glück, l. c. § 147, 2.

§ 1424.

Questions arising out of Justinian's constitution.

What is rich and what poor.

Amount of apportionment.

But it has been seen that the deceased must have been *rich*, the survivor be *poor*, and, inasmuch as this is not defined by law, jurists are agreed¹ that the deceased was rich, if the property left sufficed to maintain the survivor and the rest of the heirs; but that the survivor is poor, when he has not sufficient to live according to his or her rank in society.

The next question which arises regards the apportionment, the facts of wealth and poverty having been established. Here the survivor receives one-fourth of the whole estate, if there be three or fewer claimants to the inheritance; but be there four or more, he or she obtains a *portio virilis*, that is, the estate is equally divided among the claimants; thus the surviving husband or wife can under no circumstances obtain more than one-fourth, but may get less.

The share of the survivor must not, however, exceed 100 *libras auri*, estimated at about 3,500*l.* of British money.²

If the survivor compete partly with his or her own, and partly with step children, the amount of his portion is determined by the number of heirs, but he or she only obtains the usufruct of the proportion which would have vested absolutely in his or her own children, if he had not been their co-heir, but absolute property in the residue. This, however, is to be understood of the survivor's succession in his or her quality of husband or wife only; since, in case of relationship of the deceased, he or she comes in in that capacity.³

Right of the surviving husband or wife to his portion.

If the survivor come in with children or grandchildren, he or she does not obtain the *dominium* of his or her *portio* which vests in such children, but merely the usufruct or life estate; if, however, he or she concur or compete with other persons—as step-children, parents, or brothers and sisters of the deceased—he or she receives the absolute *dominium*.

§ 1425.

Whether the widow and widower have equal rights.

There is no doubt that the widow, if poor, thus succeeds the husband; but many deny the converse of the proposition on the authority of the 117 Novella,⁴ but it would seem not upon sufficient grounds, as that law treats only of the case of a husband who has repudiated his wife without just cause.

Now, the surviving husband has a certain legal life interest⁵ in a civil portion of his deceased wife's property, which such of his children as are no longer under his power inherit from their

¹ Struben, *Rechtl. Bed.* 2 B. 58 *Bed.*; Koch, l. c. § 111; Martius, *Rechtsgutachten*, Hiedelb. *Spruch*, coll. 1 B. N. 310.

² Nov. 22, 18.

³ Weber, ad Hein. Höpfner, § 702, n. 4, *ibique cit.*; Koch, l. c. § 110; Walch,

contr. p. 257; Koch, B. P. p. 491; Glück, l. c. § 136.

⁴ Cujac, ad N. 53; Rittershus, ad N. part 7, c. 17; Voet, ad P. 38, 17, § 24; E. F. Högemeister, *diss. jur. conjec. sec.* Nov. 117, c. 5; *haud esse reciproca*, Gryphaz, 1801; Glück, l. c. 37.

⁵ C. 6, 60, 3.

mother ; and the same applies to the grandfather, when his grandchildren inherit the estate of their grandmother.¹

In most continental countries where the Roman law forms the rule, this has given place to a more definite regulation, or is superseded by local customs, such as the so-called *Gütergemeinschaft*, or community of goods between married persons and the like.²

How affecting continental countries.

§ 1426.

If the deceased have no survivor or heirs, the *collegium* or *corpus* whereof he was a member succeeds, if it have that privilege, for all do not possess it.

Succession of the collegium.

Churches have it, when an ordained priest dies without heirs.³

Of churches.

Poor-houses, being corporate bodies endowed for the relief of decayed persons, when their beneficiary dies.

Of almshouses.

Academic institutions succede to the estate of an academical citizen⁴ dying without heirs.

Of academic institutions.

The company of the regiment, to the *relictum* of a soldier of it.⁵

Of regiments.

If any one assume the care of an idiot until his death, whose heirs, who would succede him, ab intestato or by testament, have neglected him, he succede to his property, and has, indeed, precedence over all other heirs mentioned. He must, however, have called upon the heirs of such idiot to take care of him, and they must have declined or neglected to do so, notwithstanding the application.

Of the self-constituted curator of an idiot.

Failing all these, the *Fiscus* steps in and occupies the estate as derelict ; but this must be done within four years, since otherwise the tenant in possession has acquired a prescriptive right in virtue of such possession.⁶

Of the *fiscus*.

¹ Glück, l. c. § 65, 95 ; Thibaut Pand. R. § 621 ; E. Schraeder Theorie eines gewöhnlich übersehenen successionsrechts des Mannes auf das Vermögen seiner frau, in den Abhandl. aus dem civilrechte Han. 1808, N. 4.

² Höpfner, ad Hein. § 702, P. R. ; Scherer's Lehre, v. d. ehelichen Gütergemeinschaft, 2 Theile, Manh. 1799, in which the whole is treated in extenso, Weber, ad ed.

³ C. 6, 62, 2.

⁴ Glück, § 203-4, as to the general practice of the courts.

⁵ C. 1, 3, 20, as to the successio Fabrensiū legionis, vexillationis Forner rerum quot. lib. 4, c. 7, ap. Otton. II. 234 ; Teller progr. (§ 701) cit. De successione decurionum, exhortalium, in progr. ad Leger diss. de orig. jur. pub. Lips. 1773, Weber ad Höpfner, § 703, n. 2.

⁶ Koch, l. c. § 117, etc. ; Glück, l. c. § 147, etc.

TITLE XVI.

Successio ab Intestato Secundum Novellam cxviii. 1.—Jura Successoria Personarum—Legitimarum—Legitimatarum—Adoptivarum et Arrogatarum—Successio in Capita—In Stirpes—In Lineas—First class—Who succeeds in it—To what share—Second class—Who succeeds in it—To what share—Third class—Who succeeds in it—To what share—Fourth class—Who succeeds in it—To what share—Petitio Hereditatis—Actio Familiæ Herciscundæ—Collatio—Hotch Potch.

§ 1427.

The succession to intestate inheritances before Justinian.

The provisions of the decemviral law.

Law of the prætors.

THE rule of succession to intestate inheritances before and even in the age of Justinian has been set forth, and may be summed up, thus :—

The first period is that of the decemviral law,—according to which, the deceased was succeeded by his *suus hæres*; failing him, by his *proximus adgnatus*; failing him, by the *gentiles*.

The second period comprises the innovations on the decemviral law by the *bonorum possessiones* of the prætors,—according to which, the deceased was succeeded by emancipated *sui*, by the edict *unde liberi*; the wife not *in manu*, and the husband, by the edict *unde vir et uxor*; the more remote *adgnati*, by the edict *unde legitimi*; the *cognati*, by the edict *unde cognati*; the ascendants, by the edict *unde decem personæ*; and as regarded freedmen severally, by the edicts *tanquam ex familia*, *pro patronis*, and *unde cognati manumissoris* respectively.

Acknowledged in the Code, the Institutes, and Pandects.

Justinian's consolidation of the law of succession.

The 118th Novella Constitution.

In the Code, the Institutes, and the Pandects, this law was acknowledged, with exception of the four last edicts, as has been seen in the preceding title; consequently the succession was open, in fact, to all of equal degree, either agnates or cognates. But Justinian was a friend to finality as to all but himself, and so set about recasting and consolidating the entire law of succession by a new constitution. He threw the decemviral and edictal law into one, and added certain new enactments, embodied in the 118th Novella, intituled ΔΙΑΤΑΞΙΣ. ρηί. ἀναιρούσα τὰ adgnatica δίκαια, καὶ τιποῦσα τὰς ἐξ ἀδιαθέτου κλήσεις, addressed Αὐτοκράτωρ Ἰουστινιανὸς Αὐγουστὺς Πέτρῳ, τῷ ἐνδοξοτάτῳ ἐπαρχῷ τῶν ἱερῶν τῆς τῷ πραιτωρίων. and dated on the 7th day before the kalends of August (22nd July), in the 17th year of his reign, A.D. 543.

The principles enunciated in this constitution¹ are—

That all blood relations succede *ab intestato*.

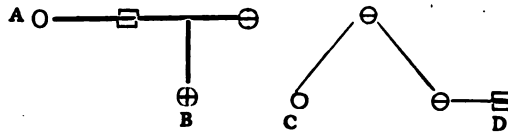
That there is no difference between agnates and cognates,—the nearer of either excluding the more remote in either.

That there is no difference between *sui* and *emancipati*, except in the form; the former being *ipso jure* heirs, the latter being required to administer.

That certain other persons, unconnected with the deceased by blood, should on special grounds have the right of succession.

It must be here remarked, that affinity² never conferred any claim to an intestate succession, consanguinity forming the basis of this as well as of former laws,³ thus :⁴—

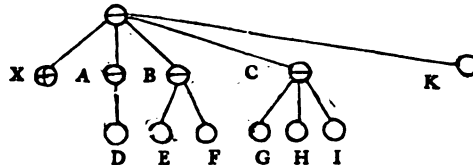
The stepfather A does not succede to his stepson B, nor the brother C to his sister-in-law D.



Its general principles.

§ 1428.

The following is a diagram illustrative of *successio jure representationis*, or right of one to the share his immediate ancestor would have taken had he been alive.⁵



The law of representation.

¹ Prefatio. Quum multas et diversas leges antiquis temporibus promulgatas inveniamus, per quas differentiam successionis ab intestato inter cognatos ex maribus et feminis non juste introducta est, necessarium duximus per presentem legem omnes simul successiones cognationis ab intestato clara et compendiosa distinctione definire, ut cessantibus prioribus legibus de hac causa latis, in posterum ea sola servantur, quæ nunc definimus. Itaque quoniam omnis ab intestato familiæ successio tribus ordinibus cognoscitur, scilicet ascendentium, et descendendum, et collateralium, qui in agnatos et cognatos dividuntur, primam esse sancimus descendendum successionem.

⁴ Nullam vero differentiam esse volumus in quacunque successione aut hæreditate inter masculos et feminas ad hæreditatem vocatos, qui ut ex æquo ad hæreditatem vocentur definivimus, quos communiter ad hæreditatem vocari definivimus sive per masculum, sive per feminam defuncti conjugantur, sed in omnibus successionebus agnatorum et cognatorum differentiam cessare volumus, sive per feminam personam sive per emancipationem, vel alium quemcunque modum prioribus legibus considerata fuerit, omnes sine ejusmodi differentia secundum cognationis suæ gradum ad cognatorum ab intestato successionem venire jubemus.

² C. 6, 59, 7, *adfinitis jure nulla successio permittitur*; C. 6, 38, 5, alludes to F. C.

³ The prætors, notwithstanding the extent of their relaxation of the decemviral law, never admitted the *affines*.

⁴ ○ denotes a male; □ a female; ⊕ the person deceased whose *relictum* or estate is in question; ⊖ ⊞ persons dead, but whose *relicta* are not presently in question; ○—□ denotes married persons. These are the signs generally used, but others are found in some authors.

⁵ The expression *jus representationis* is not to be found in Justinian's works, but is of a later date.

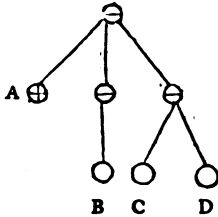
Here X dies, and D receives the share to which his deceased father A would have been entitled to had he been alive. E and F divide the share which would have fallen to B; so G, H, I, that of C.

The succession
by poll and by
branches.

In capita.

When there are more than one claimant, the inheritance is divided *in capita*, by poll; or *in stirpes*, by branches; or *in lineas*, by lines.

The succession is said to be *in capita*, when as many portions are made as parties.



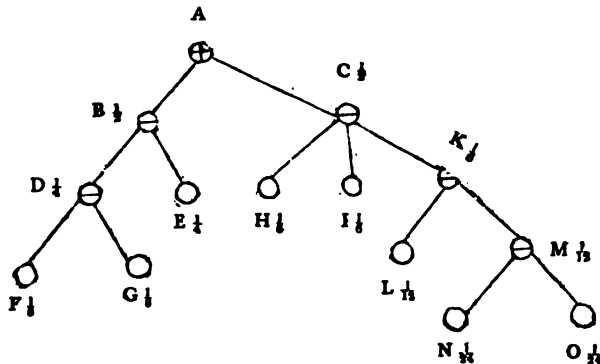
Here A's *relictum* is divided into three portions for the three existent heirs, B, C, D.

In stirpes.

Succession *in stirpes* arises—

1. When equal partition is made according to the number of persons in the nearest and next nearest degree of succession.
2. When if one, or some, or all such persons are dead, and their respective portions are again subdivided among their next heirs.
3. When these latter or next heirs are also dead, and their respective portions are again further equally subdivided among their next heirs.
4. And so further, &c.

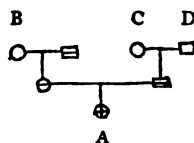
Thus :—



In distributing A's estate, the inheritance descends through B, the other through C; E and D would, therefore, each receive $\frac{1}{2}$ of $\frac{1}{2}$, = $\frac{1}{4}$. H, I, K would take each $\frac{1}{2}$ of $\frac{1}{2}$, = $\frac{1}{4}$; F and G, $\frac{1}{2}$ of $\frac{1}{4}$, = $\frac{1}{8}$ each; L and M, $\frac{1}{2}$ of $\frac{1}{4}$, = $\frac{1}{8}$ each; and lastly, N and O, $\frac{1}{2}$ of $\frac{1}{8}$, = $\frac{1}{16}$ each. The children always equally dividing the paternal share.

Succession *in lineas* arises where the inheritance is so divided amongst ascendants, that the paternal and maternal sides respectively take moieties, thus :—

Here A dies, and leaves a grandfather B on the paternal side, but both his grandparents B and C on the maternal side. Here the inheritance is divided,—the grandfather B taking one moiety, and the grandfather C and the grandmother D the other moiety between them, or each $\frac{1}{2}$ of $\frac{1}{2}$.



§ 1429.

Hence, in intestate successions, two questions always arise :—
1. Who succeeds? 2. How much he takes? This depends upon the four classes or orders of relations :—

- | | |
|-------------------------------------------------------------------------------------------------------|-----------------------------------|
| In the first class succede, all <i>descendents</i> of the deceased. | Who succeeds.
What each takes. |
| In the second, the next ascendants, brothers and sisters of the full blood, their sons and daughters. | The first class
The second. |
| In the third, half-brothers and sisters, and their sons and daughters. | The third. |
| In the fourth, all other relations, according to the proximity in degree. | The fourth. |

These rules may be impressed on the memory by the following verses ;—

Descendens omnis succedit in ordine primo.
Ascendens proprior, germanus filius ejus.
Tunc latere ex uno frater quoque filius ejus.
Denique proximior reliquorum quisquis superstes.

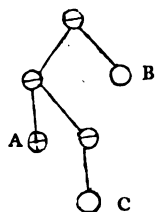
It must here be remarked that the above division differs from that of Justinian, into the *ordo descendentium*, *ordo ascendentium*, and *ordo collateratium*. The object of the above deviation, according to Koch, adopted by Höpfner,¹ and since generally, is to obviate the confusion which arises from certain collaterals having equal claim with ascendants, and to render this puzzling subject more clear.

§ 1430.

The principle with respect to classes is, *that the prior class always excludes those following*. Thus, so long as persons belonging to the first class exist, none of the second can claim the inheritance or any part thereof; in like manner, the second class must be exhausted before those belonging to the third can claim; but these latter must come in before those of the fourth class can take.

Thus :—

¹ Hein. § 684.



A dies, C inherits alone, for B has no co-claim to the succession, although related to the deceased in equal degree, for C belongs to the second, and B to the fourth class.

Persons of the same class succeed together.

But persons in the same class do not exclude each other, but succeed together; for ascendants, brothers and sisters, and their children are in one class, and succeed alike.

These rules appear to make the matter pretty clear; but it must be observed, they do not apply to the triple divisions.

Now, as it is perfectly possible that persons, where the succession is *in lineas* and *in stirpes*, may be doubly related to the deceased, so they may have a double claim on the inheritance.

The duplicitas vinculi.

This *duplicitas* may be *vinculi*, as of brothers and sisters of the whole and half blood, which is not the point in question, but of that *cognationis*,—for two sorts of relationship may concur in one and the same person, the natural and the civil; thus, a grandfather on the maternal side may adopt his grandson;—and a man may be related to the deceased on more than one side; thus, if we suppose that the parents of deceased were the children of two brothers or sisters, and he leave the father of one of his parents on the father's, and one who is so on both the father and on the mother's side; but in cases where the number of persons decides the portions, this double relationship is not taken into account.¹

§ 1431.

First class.

To the first class belong the descendants of the deceased, being capable of succession.² These may be,—1. *Legitimi, legitimati, or illegitimi*; or, they may be *adoptivi*.

All legitimate children, male and female, *sui* or *non sui*, succeed,

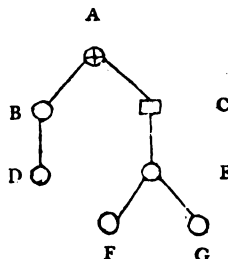
All legitimate children of both sexes succeed without restriction.

¹ Koch, succ. ab intest. auct. 3.

² Itaque quem descendendum relinquit is, qui intestatus moritur, cujuscunque sexus aut gradus, sive ex masculis, sive ex fœminis descendat, sive sui juris, sive sub potestate sit, omnibus ascendentibus et a latere cognatis præponatur. Licet enim defunctus sub alterius potestate fuisset, liberos tamen ejus, cujuscunque sit sexus aut gradus, ipsis etiam parentibus, sub quorum potestate defunctus erat, præferri jubemus, scilicet in illis rebus, quæ secundum alias nostras leges parentibus non adquiruntur. Quantum enim ad illarum rerum usufructum, qui illis adquiri vel servari debet, leges de his latas parentibus servamus, ita ut, si quem, ex his descendentibus relictis liberis mori contigerit, filii ejus aut filie, aut reliqui descendentes, sive sub potestate defuncti, sive sui juris inveniantur, in parentis sui locum succedant, et tantum ex hæreditate defuncti partem capiant, quotquot etiam sint, quantum parens ipsorum, si superstes esset, accepisset; quam successionem in stirpes antiquitas vocavit. In hoc enim ordine gradum requiri nolumus sed cum filiis et filiabus nepotes ex præmortuo filio vel filia vocari, sancimus, nulla differentia facienda, sive masculi, sive fœminæ sint, et sive ex masculis, sive ex fœminis descendant, sive sub potestate, sive sui juris sint. Et hæc quidem de successionem descendendum deposuimus. Consequens autem nobis videtur de ascendentibus etiam, quomodo ad successionem descendendum vocentur, constituere.

however remote their degree, on proof of relationship ; but none must stand between the heir and the deceased, that is, none must be nearer in the same line,—thus, the children get no share if their father or mother be living and inherit ; in like manner, a grandfather excludes the grandchildren.

A dies, and B and C inherit, and D, E, F, G, are excluded.



Thus emancipated children no longer require *B. P. ex edicto unde liberi*, because their right is now founded on the civil law.

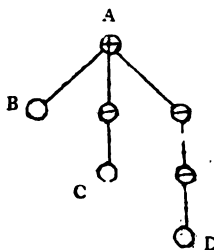
Children succede to their mother and grandmother by this law, without recourse to the *S. C. Orphitianum*.

Difference in degree being of no importance in this class, the descendent of the deceased inherits, although other descendants may exist nearer in degree, thus :—

Emancipated children require no beneficium prætoris or the like.

Difference of degree, no excluding impediment.

A dies, and B, C, D inherit, although B is related to the deceased in the first, E in the second, and D in the third degree.

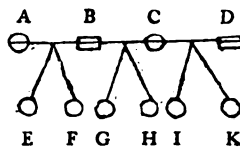


When there are issue by different marriages, they succede to the common parent, be it father or mother ; but own issue, to the particular parent, thus :—

Issue by children of different marriages.

A marries B, and dies, leaving issue E and F ; D marries C and dies, leaving issue I and K ; B then marries C, both die, leaving issue G and H.

Now B and C are common, and A and D particular parents, then E and F succede A alone ; E, F, G, H succede B ; G, H, I, K succede C ; and I and K succede D.



The issue of the first marriage or marriages take first of all whatever the father or mother inherited or otherwise possessed, *titulo lucrativo*, from the deceased husband or wife,—for when B remarried with C, she forfeited the dominion of what she inherited

from her deceased husband A, and this right devolved upon her children E and F; on her death they retain it, plus such life interest or usufruct as the mother enjoyed during her life. Hence G and H, the issue of her marriage with C, get nothing from the late A's property, because the legal estate on the death of A devolved on his widow, conditionally on her not remarrying,—in which event it vested in E and F, although the possession did not pass from the mother till her death; in like manner, whatever C inherits from his wife B is vested in his issue C and H; but I and K receive no part thereof.¹

§ 1432.

The succession of legitimated children. Legitimati per subsequens matrimonium. Non plene per Rescriptum. Plene per Rescriptum. When legitimate issue concur.

Children legitimated, *per subsequens matrimonium*, are in absolutely the same position as those born in wedlock.

Children, *per rescriptum non plene legitimi*, on the other hand, are to be looked on in matters of succession as illegitimate, since such legitimation operates no rights of inheritance; but

The rights accruing from *legitimatio per rescriptum plene* are not in the same category.

Legitimated children clearly inherit, default of legitimate issue; even so if a man beget children out of wedlock and having obtained their full legitimation, *after that* marry and beget children in wedlock, the legitimated and legitimate possess equal rights.

But let it be supposed that a man having illegitimate issue, marry and beget children in wedlock, and *after that* obtain the full legitimation of his first family, what right of succession do they possess to the paternal property? Upon this point there are three opinions,—firstly, that they have the same rights as those subsequently born in wedlock;² secondly, that those born in wedlock have a previous claim for their *portio legitima*, but that quoad the rest, the legitimated and legitimate succede together and alike, this is the general opinion;³ thirdly, that the legitimated children take nothing, inasmuch as the legitimate had already acquired an indefeasible vested interest in the inheritance.⁴ This latter opinion contains the best logic, and is, moreover, supported by the constitutions⁵ of Justinian, which declare expressly that natural children can only be legitimated by rescript, in default of legitimate; and so jealous were the Roman legislators lest the legitimate children should be prejudiced by the illegitimate issue, that natural children could not be instituted in a testament for more than one-twelfth,⁶

¹ The issue of the second marriage first take specially what the deceased husband or wife had received from their own father or mother by blood *sponsalitia largitate*, C. 5, 9, 3 & 4; Nov. 22, c. 23; Nov. 98, c. 1; Glück, v. d. Intest. Erbfl. § 101, et ibi D. 4. Of the property which the deceased obtained mediately by inheritance from one of his children, from out of the estate of a former wife or husband, Nov. 22, c. 76.

² G. H. Ayrer, diss. de rescript. legit. prin. plenissimum effect. legitimi licet liberi extant. Goett. 1743; Koch, de succ. ab intest. § 29.

³ G. S. Modihn, diss. de legitimo nat. post. leg. in succ. cum legitimatis, Hal. 1755.

⁴ Puf. l. c.

⁵ Nov. 74, 1; Nov. 89, 9.

⁶ § 1239, h. op.

where there existed children born in wedlock ; hence, if the legitimation by rescript has been obtained, it does not place the issue so legitimated in a better position.

Höpfner¹ is of opinion that none of these restrictions apply on the continent, where the Roman law guides intestate and testamentary inheritances.

Höpfner's view of the *usus hodiernus*.

§ 1433.

Referring to the sections of this work in which *adoptio stricte* or *plene*, and *minus plene* and *arrogatio*² is treated of at length, it now remains to be seen what rights persons have in respect of intestate successions according to the *jus novissimum*. Persons arrogated, or adopted in the full sense, succede to the inheritance of the adopting father, but to no part of that of the natural father,—and this first fact is beyond doubt,³ the second, however, is not so ; for if the adopting grand- or great-grandfather then after emancipates the adopted son, he succedes his natural father.

Succession of adopted children.

Now, inasmuch as the preface of the 118th Novella confers on cognates and on agnates equal successorial rights, and inasmuch as a person, though adopted, still remains a cognate of his natural parent, it follows that a person arrogated, or perfectly adopted, succedes to the inheritance of both.⁴

Cognates admitted together with the agnates.

Succession of *plene* adoptati.

An arrogated person succedes the male ascendants of the arrogating father, when such person has concurred in the arrogation ; but not so the wife of the arrogator, her mother, and grandmother.

Of arrogated persons.

A child adopted *minus plene*, or imperfectly, inherits of both the adopted and natural father,—but the adopting father can exclude such by will ; such adopted child does not succede to the wife of the adopting father nor to her ascendants, notwithstanding their concurrence in the adoption ; and hence it follows, that when a woman adopts, the child succedes to her only, not to her husband nor to her ascendants.⁵

Of *minus plene* adoptati.

§ 1434.

Illegitimate children are born, either of a marriage within the prohibited degrees, or *ex damnato coitu nati* ; or of adulterous intercourse, *adulterini* ; of a common whore, *vulgo quæsit* ; or of a maid, *spurii* ; or, lastly, of a concubine, who are *naturales*.⁶

Of illegitimate issue.

The first inherit from neither parent.⁷ The second,⁸ third, and

¹ Höpfner in Hein. ed. Weber, § 688.

² § 683-707, § 1239, h. op. Notandum est arrogationem dici de adoptato homine sui juris, adoptionem stricte plenam, de *descendentibus sub patriâ potestate* adoptatis ; minus plenam, de *aliis sub patriâ potestate quibuscunque* adoptatis.

³ C. 8, 48, 10.

⁴ In extenso de hoc, vide Lehr in Hage-

mann, et Günther's Arch. f. I. Rechtsgelchrs, 5 B. No. 9 ; Glück, l. c. § 110, etc.

⁵ C. 8, 48, 5.

⁶ § 660, h. op.

⁷ C. 5, 5, 6 ; Poll. de exheredat. et præterit. c. 41 ; Titius ad Lauterbach, obs. 793.

⁸ It is erroneous to suppose *adulterini* to be within the provisions of Nov. 39, c. 15.

Where mother
persona illustris.

Quintuple divi-
sion of official
nobility under
the oriental
emperors.
Illustres, who.

Succession of
the naturales.

Rule of distri-
bution in the
first class.

fourth inherit from the mother by the *S. C. Orphitianum*, but take nothing from the father.¹ And here, respect must be had as to whether² the mother be a *persona illustris*, and has also issue born in wedlock; the *adulterini*, *vulgo quæsit*i, and *spurii* are excluded by them, otherwise they inherit.

Under the oriental emperors, the magistracy was distinguished into five classes,—*illustres*, *spectabiles*, *clarissimi*, *perfectissimi*, and *egregii*.

The *consules*, *magistri militum*, *quæstores sacri palatii*, *magister officiorum*, *comites sacrarum largitionum*, *comites rerum privatarum*; *præfecti prætorio*, *præfecti urbi*,³ had all the prædicate or style, *illustres*; hence *mater illustris* is she whose husband or father belonged to the illustrious class. The reason given for the rule of law which excluded the *adulterini*, *vulgo quæsit*i, and *spurii* from the succession of a *mater illustris* having legitimate children, is found in the *Codex*,⁴ *quia in mulieribus ingenuis et illustribus, quibus castitatis observatio præcipuum debitum est, nominari spurios satis injuriosum satisque acerbum, et nostris temporibus indignum esse pedicamus*.⁵

Naturales inherit of the father only when he has no legitimate issue, and can take then even only $\frac{1}{4}$ of his property, which they must, moreover, share with their mother; and it would appear that, if the *concubina* survive without issue, she takes $\frac{1}{2}$.⁶

§ 1435.

After having seen the persons who succede in the first class, their respective shares of the inheritance becomes the next question. The general rule is, that those of the first degree, viz., sons and daughters, succede *in capita*; those of the second, grandchildren of the deceased, *in stirpes*.

¹ *Sui pater incertus est* applies to all but the *naturales*, C. 5, 5, 5; Ludolff, v. d. Intestat Erbfolge, § 160; Koch, 1.

² C. 6, 56, 5; Koch, de succ. ab intest. § 42, sch., holds that children issue of a *stuprum*, do not succede the mother, it being a *coitus damnatus*, and because as such it is punishable by the *Læx Julia de adulteriis*. But Nov. 79, cap. ult. speaks clearly of marriages within the prohibited degrees only. Again, although the *stuprator* was punishable by the *L. Julia*, the *stuprata* was not so; hence the *stuprum* was not a *damnatus coitus*, so far as she was concerned. The term *vulgo quæsit*i is certainly used in all passages which speak of the succession of illegitimate children to the mother's property, and e converso C. 6, 56, 5, § 3; P. 38, 17, § 2; but the term does not import the issue of whores (*ex meretrice nati*), in the strict sense of the word, but frequently comprises all illegitimate chil-

dren, P. 1, 5, 5; P. 25, 3, 5, § 5; P. 38, 2, 18; Höpfner ad Hein. § 690, n. 4.

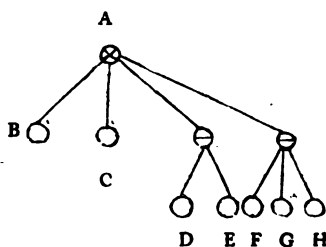
³ Gothof. ad Cod. Th. T. 3, p. 108.

⁴ C. 6, 56, 5.

⁵ Höpfner hereupon remarks: "Curious that if such a mother bear whore-sons, it is a libel to say so; and how does it follow that the whore-sons do not succede her when she has legitimate issue, but do if she have not?" The answer is not difficult. A libel is not less a libel because true, and the law simply says it is a *libel* to say a gentle or noble woman has bastards, yet they shall succede, not being to blame, but shall not prejudice legitimate children. The same author thinks this law not applicable to Germany, taking an analogy of rank; neither is this clear to FK.

⁶ I. M. Roman, diss. de succ. concub. si sola superstes sit, Mogunt, 1787, § 1239, h. op.

There being four children of A, the inheritance is divided into four shares; B and C *liberi primi gradus* take whole fourths each; D and E take each $\frac{1}{2}$ of $\frac{1}{4}$, or $\frac{1}{8}$ each; F, G, H $\frac{1}{3}$ of $\frac{1}{4}$, or $\frac{1}{12}$ each; being all five *liberi ulterioris gradus*. Now if B and C, who inherit *in capita*, be struck out, D, E, F, G, H would succede *in stirpes*, and take D and E $\frac{1}{2}$ of $\frac{1}{8}$, or $\frac{1}{16}$; and F, G, H $\frac{1}{3}$ of $\frac{1}{8}$, or $\frac{1}{24}$ each.



No sufficient reason exists for not stating, as in the present case, that all persons of the first class succede *in stirpes*, in which case B would represent the first, C the second, and D, E, F, G, H the third.¹

It is also an admitted fact in this class, that succession *in stirpes* obtains, and that the nearer does exclude the more remote; hence it has been disputed whether the grand- and great-grandchildren succede virtually of their own proper right, *jure proprio*, to their grand- or great-grandfather or *jure representationis*, and whether such can repudiate the paternal inheritance, and succede *in capita*.² Many high authorities repudiate the principle of representation in the first class, because they say it only applies in those classes in which the nearer degree excludes the more remote, and the more remote does not claim as representative of a deceased ascendent. Again, according to the law of the Twelve Tables, *all sui*, and by the prætorian law, *all emancipati*, without distinction of degree, inherit; but the 118th Novella confers the rights of inheritance on all descendants, without reference to degree; and Weber³ observes that there is no trace of any fiction in the class of descendants whereby the more remote is admitted to the succession, *ex jure et beneficio parentis*, as was the case in the collateral line; and hence Justinian⁴ declares,—*Hujusmodi vero privilegium in hoc ordine cognationis solis præbemus fratrum masculorum et fæminarum filiis aut filiabus*, ut in sacrum parentium jura succedant, brothers' sons, nephews, are not to be excluded by brothers, uncles.

The succession is in stirpes.

The nearer degree does not exclude the more remote.

¹ Rotgerius, de succ. legit. c. 7, p. 225, sq.

² G. L. Boehmer, diss. de discrimine suor. et emancipatorum in succ. in test. § 3; G. D. C. ab Engelbrechten, exerc. de I. R. in succ. et an imprimis nepotes indigeant, Goett. 1751, § 7, seq.; I. S. F. Boehmer, diss. de nep. avo jur. prop. succ. (Frf. ad Viadr. 1762), p. 14, seq.; I. F. Doles, diss. de jur. rep. in succ. descendendum exule, Lips. 1778, § 6, seq.

³ Ad Höpfner, § 691, n. 1.

⁴ Nov. 118, 3; Koch, in his "Basis of a New Theory," Giess. 1790, p. 11, repudiates this controversy as useless; contra,

Glück, v. d. Intest. Erb. § 100, urges that the representative system is irreconcilable with the right of grandchildren to inherit of their grandparents, when they are not also their parents' heirs (vid. C. 6, 14, 3, where the parents are dead), and with the claim of the grandchildren to the inheritance of their grandparents, which their parents have repudiated, vide et Ch. Gmelin diss. histor. representationis, I. C. R. exhibens Tüb. 1787. Of the double portion accruing to the descendants ex duplici stirpe, Webr. l. c. § 684, n. x. x.

Succession by representation founded on a fiction.

In its origin, the succession by representation is clearly founded on a fiction. The succession being really *in capita*,—suppose one of three brothers to be the intestate, leaving one brother alive, and the children only of the other, the surviving brother would exclude his nephews, because the nearer excludes the more remote; the fiction then consists of supposing the father of these nephews of the testator to have died *after* him, so as to have obtained an interest transmissible to his children, who then divide his share; for if they really succeeded *in capita*, they would take each an equal share with their uncle, which they do not, but merely their father's share.

§ 1436.

The difference between the English statute and the civil law as to the first class.

The statute laws of England differs from the civil law in this class, in two respects:—

First. In that it admits the widow of the deceased, if alive, amongst the children and other descendants.

Secondly. In that grandchildren, who it has been seen succeed by the civil law *in stirpes*, succeed by the English *in capita*,—thus, if a man die leaving grandchildren by three different sons deceased before him—three by one, six by another, and twelve by a third—each class by the civil law would take one-third, but by the English law they would take *in capita*, to each of the twenty-one grandchildren, an equal share; for the statute is only supposed to rule representation where it is necessary to prevent exclusion. The fathers are in the above case passed over, and the grandchildren looked upon as direct issue of their grandfather.

§ 1437.

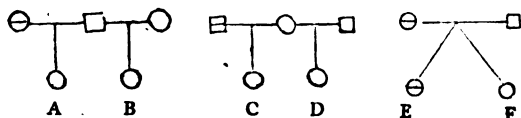
Succession in the second class.

The second class is called to the succession in default of the first, and applies to ascendants;¹ the general rule being that the nearer degree excludes the more remote, and no representation is

¹ 2. Igitur si defunctus descendentes quidem hæredes non reliquit, pater vero vel mater aliive parentes illi superstites sint, omnibus ex latere cognatis eos præferri, sancimus, exceptis solis fratribus defuncto ex utroque parente conjunctis, sicut in sequentibus declarabitur. Si vero multi ascendentium supersunt, eos præferri jubemus, qui gradu propinquiores inveniuntur, masculos et fœminas, sive ex matre sive ex patre sint. Si vero ejusdem gradus sint, equaliter inter eos hæreditas dividetur, ita ut dimidiam quidem partem omnes ex patre ascendentes, quotcunque sint, accipiant reliquam vero dimidiam ascendentes ex matre, quotcunque eos inveniri contigerit. Si vero cum ascendentibus inveniantur fratres vel sorores defuncto per utrumque parentem conjuncti, cum ascendentibus gradu propinquioribus vocabuntur, licet etiam pater aut mater sint, hæreditate scilicet inter eos pro numero personarum dividenda, ut et ascendentium et fratrum quilibet equalem partem habeat. Neque in hac specie pater in filiorum aut filiarum parte ullum usumfructum sibi omnino vindicare queat, quoniam pro illo usufructu partem ipsi hæreditatis et domini jure hac lege dedimus. Nec ulla differentia inter illas personas observetur, sive fœminæ sive masculi sint, qui ad hæreditatem vocantur, et sive per masculum, sive per fœminam jungantur, et sive sui juris, sive sub potestate fuerit, cui succedunt. Reliquum est ut tertium quoque ordinem definiamus, quo ex latere adpellatur, et in agnatos et cognatos dividitur, ut hac quoque parte definita lex undique perfecta inveniat.

admissible. This class comprises the nearer¹ ascendants, full born brothers and sisters, *fratus germani*, *sorores germani*,² sons and daughters of full born brothers and sisters.³

A and B are *uterine* brothers, C and D half-brothers by the father, but neither are German, as E and F.



§ 1438.

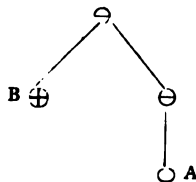
Although, according to the above, all full born brothers and sisters are capable of succession, it does not follow that their sons and daughters or ascendants are so; the rule on this point is, that children who *fully* succeed to their parents in the first class, are capable of succeeding to their uncle and aunt in this class also.

Who succeed in the second class.

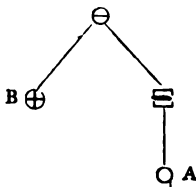
That children who do not *fully* succeed in the first class, are utterly excluded in this class.

Full succession necessary in this class.

A being a *filius naturalis in primâ classe patri non plene succedit*, hence he cannot succeed to his uncle B in the second class.



But although A be a *filius naturalis*, he succeeds to his mother,—*ergo*, he can succeed to his uncle B.



With respect to ascendants, the general rule is, “that the right of succession is reciprocal between ascendants and descendants.”⁴

Right reciprocal between ascendants and descendants.

Issue legitimated, *per subsequens matrimonium*, succeed their parents, hence the parents succeed them.

The issue of an incestuous marriage do not succeed their parents, hence the parents do not succeed them.

Adulterous, spurious, natural, and whore sons succeed the mother, hence the mother succeeds them as aforesaid.⁵

¹ The more remote being excluded by them.

² Grandchildren do not coinherit in this class for *jus representationis ultra fratrum liberos non obtinet*.

³ Sons and daughters of the same father and mother are of the full blood; by *full born*, not only this is intended to be conveyed, but also that, being of such full blood, they possess a right of succession.

⁴ The exceptions are,—that a child adopted *minus plene* succeeds the adopting father, but not e converso, C. 8, 48, 10, § 1; a *mater illustris* succeeds her *spurius*, notwithstanding her having legitimate children, but not e converso, Koch, l. c. § 51; a woman does not succeed her adopted child, Id. § 67.

⁵ § 1443, h. op.

Natural children succede the father, then, only when there exist no legitimate children or wife, hence the father succedes to them only when they have left no legitimate wife.

§ 1439.

Rule of distribution in the second class.

Ascendents succede in *lineas*, collaterals in *capita*.

Having shown who succedes, it remains to be seen how the inheritance is distributed in the second class. The general rule is,—

Ascendents succede in *lineas*; collaterals, being brothers or sisters, in *capita*.

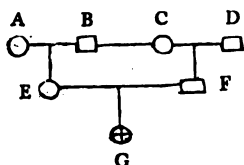
The children of collaterals, being brothers or sisters, in *stirpes*.

To which there are two exceptions:—

1. Ascendents, who compete with brothers or sisters or their children, succede in *capita*; *ascendentes juncti succedant in capita*.

2. When neither ascendents nor full born brothers nor sisters are extant, but only the children of such, they succede in *capita*; *fratrum proles succedant in capita*.

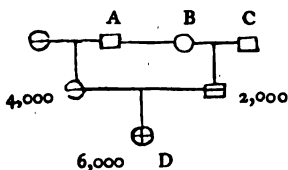
The deceased leaves parents and grandparents,—the former inherit as next in degree, and so exclude the latter.



G dies, and E and F inherit, but A, B, C, D have no participation in the succession.

Grandparents succede in *lineas*.

The same is the case, if but one of the parents be alive,—the grandparents are equally excluded. But when grandparents alone are extant, they inherit together in *lineas*.



Here we have a maternal grandmother and a paternal grandfather and grandmother. The grandmother A here takes one moiety of the estate of D, the grandfather B and grandmother C divide the other. Nor is the sum D inherited from his respective parents taken into account, in respect of which

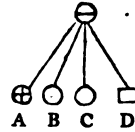
the 118th Novella¹ makes no provision; and though D got 4,000 *aurei* by his father, 2,000 only by his mother, yet A will receive 4,000, and B and C 4,000 each.

Full bred brethren succede in *capita*.

If the deceased leave full bred brothers and sisters only, they succede in *capita*.

¹ Sed vide Koch, de succ. ab intest. § 46; Walch, contr. p. 225; Weber ad Höpfner, § 684, n. xx.

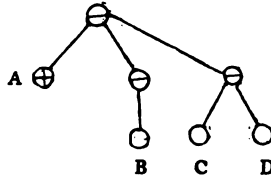
A's *relictum* is equally divided between A, B, C, D.



When *children* of brothers and sisters survive, but neither brothers and sisters nor ascendants, the succession is *in capita*.

Children of brethren succede in capita.

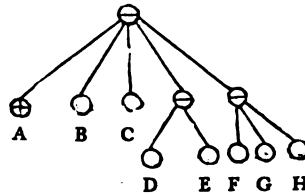
A dying, leaves none but his brothers' children, B, C, D, who therefore make equal division of his estate.



When brothers and sisters compete with the children of brothers and sisters, the succession is *per stirpes*.

Brethren competing succede per stirpes.

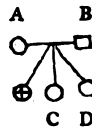
A's estate is divided into four : B and C each take $\frac{1}{4}$; D and E $\frac{1}{4}$ of $\frac{1}{4}$, = $\frac{1}{8}$; F, G, H, $\frac{1}{3}$ of $\frac{1}{4}$, = $\frac{1}{12}$.



When ascendants and full bred brothers and sisters survive, both inherit *in capita*.¹

Ascendants and brethren succede in capita.

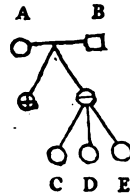
A, B, C, and D, each take $\frac{1}{4}$



If ascendants and the children of the deceased brothers and sisters compete,—the former inherit *in capita*, the latter *per stirpes*.²

Ascendants with the children of deceased brethren succede :—1. in capita ; 2. in stirpes.

Here the division is triplex : A takes $\frac{1}{3}$, B $\frac{1}{3}$, and C, D, E each $\frac{1}{3}$ of $\frac{1}{3}$, = $\frac{1}{9}$ each.



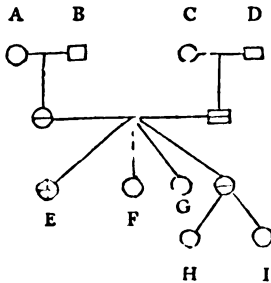
¹ Voet. ad Pand. tit. de succ. ab intest. (post tit. 14, lib. 38), § 13, thinks grandparents are excluded by full bred brothers and sisters; sed vide Puf. T. 4, obs. 139; Hüber, prælect. ad Inst. tit. de succ. ab intest. n. 10.

² Voet. l. c. § 12, thinks the children of

deceased brothers and sisters do not inherit with ascendants, if brothers and sisters do not survive; but this is circumstantially refuted by Cocceii, jur. con. lib. 38, t. 15, q. 6; Hammesen, tr. de compact. grad. in disa. prolusoria.

Ascendents and brethren in capita, nephews in stirpes.

If ascendents, brothers, and brothers' children survive,—the first and second inherit *in capita*, the last *per stirpes*.¹



The estate of E is divided by 7, whereof 6 parts fall to A, B, C, D, F, G, or $\frac{1}{7}$ to each, and the remaining $\frac{1}{7}$ is divided between H and I, or $\frac{1}{14}$ for each.

§ 1440.

The law of England varies from the provisions of the Novella.

By the law of England, the father takes the whole personal estate of his intestate son, and does not share with the mother, as by the civil law.² A next of kin in the ascending line is preferred before all collaterals, the grandmother to the aunt; but the statute prefers nearer collaterals to more³ remote direct ascendants, whereas by the civil law collaterals have no claim at all, until not only descendants, but also ascendents (except full bred brothers and sisters, who inherit together with such ascendents) have been exhausted.

The brother is preferred to the grandmother or grandfather by the English law.⁴

By the civil law, it has been seen they inherit *in capita*, or together, though some prefer the grandfather, because, though equidistant, he is in the direct line.

§ 1441.

Who succeeds in the third class.

The third class comprises half brothers and sisters, their sons,

¹ This is doubtful by Roman law. Accursius thinks *per stirpes*; Azo, *in capita*; vide Vinn. ad I. 3, § 5, p. m. 555, et ejusd. auct. Select. Quæst. II. 30, et Hunnius in resolut. lib. 3, tr. 1, § 9, 36. When a brother and a brother's children survive, of whom the first have repudiated the inheritance, or have died before *aditio* or administration, the brother's children inherit *per stirpes*; Glück, opusc. fascic. 4, p. 151, seq.; et Id. v. d. Intest. Erbfl. § 122, etc.; Koch, l. c. § 45 & 78. E. Schraeder on the intestate succession of ascendents, when such compete with full bred brothers and sisters, or their children (german), in d. Abhandl. aus dem Civilrechte, Han. 1818, n. 5, § 6, etc.

² Under Hen. I. either could have taken the whole real estate; soon after that it was altered in favor of collaterals, and the prin-

ciple established "that inheritances do not ascend." The law is now restored as far as the father taking precedence of collaterals is concerned.

³ Blackborough v. Davis, per Holt, C. J. father and mother are nearer than brother and sister, so grandfather and grandmother are nearer than uncle and aunt; E. 13 W.; 1 Salk, 38, 251; Prec. Cha. 527; 12 Mod. 623; 1 P. Will. 51; Ld. Raymond, 684; Woodroffe v. Wickworth, T. 1719; Prec. Cha. 527.

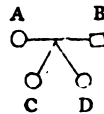
⁴ Poole v. Willshaw, T. 1708: Norbury v. Vicars (Fortescue, M. R.), M. 1749; Evelyn v. Evelyn, H. 1754; Hardwicke, Ch. quod videtur ibique cit. This important leading case is well worthy the attention of civil lawyers (Burn, Will's Distribution, p. 417).

and daughters; in default of ascendants, full bred brothers and sisters, and their children.¹

Half brothers² are such as have but one common parent to whom they succede *plene*.

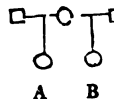
These may be children of the same father, but of three descriptions of different mothers.

If A and B, the children of C and D, were the issue of a *stuprum*, or *concubinatus*, they are half sisters, succeeding the mother only, or the father imperfectly.



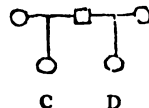
Half blood
by the same
father and different
mothers.

The half brethren are partly *consanguinei*, having a common father, to whom they succede *plene*, *quia ex eodem sanguine procreati sunt*, as A and B; or,



Consanguinei
half blood.

Uterini, who have a common mother, so called *quia ex eodem utero venerunt*, as C and D.



Uterine half
blood

All half brethren are *legitimi ad successionem*, but not so their children.

succede, but not
their children.

¹ 3. Igitur si defunctus neque descendentes neque ascendentes relinquit, primo ad hæreditatem vocamus fratres, et sorores ex eodem patre, et eadem matre natos, quos etiam cum parentibus ad hæreditatem vocavimus. His vero non exstantibus in secundo ordine illos fratres ad hæreditatem vocamus, qui ex uno, qui ex uno parente defuncto junguntur, sive per patrem solum sive per matrem. Si vero defunctus fratres relinquit et alterius prædefuncti fratris aut sororis liberos, hi cum hiis paternis et maternis, masculis et feminis, ad hæreditatem vocantur, et quotcumque tandem sint, tantam ex hæreditate partem capient, quantam parens eorum habiturus erat, si viveret. Unde consequens est, ut, si forte præ mortuus frater cujus liberi supersunt, per utrumque parentem defunctæ personæ conjunctus fuerit, superstites vero fratres per patrem forte solum aut matrem illi conjungantur, liberi ejus patris suis præferantur, etiam vel tertio gradu sint, sive a patre sive a matre sint hiis, et sive masculi sive feminæ, sicut pater ipsorum prælati fuisset, si vixisset. Contra ea si quidem superstes frater per utrumque parentem defunctum cognatione attingat præmortuus vero per unum parentem conjungatur, hujus liberos ab hæreditate excludimus quemadmodum et ipso, si viveret, excluderetur. Hoc autem privilegium in hoc cognationis ordine solis concedimus fratrū masculorum vel feminarum filiis vel filiabus, ut in parentum suorum iura succedant, nulli vero alii plane personæ ex hoc ordine venienti hoc jus concedimus. Sed et ipsis fratrū liberis tum illud beneficium præbemus, quando cum hiis suis masculis et feminis sive paternis sive materni sint, vocantur. Si vero cum fratribus defuncti descendentes etiam, ut jam ante diximus, ad hæreditatem vocantur, nullo modo ad successionem ab intestato fratris aut sororis liberos vocari permittimus, nec si ex utroque parente pater ipsorum vel mater defuncto conjunctus fuerit. Quandoquidem igitur fratris et sororis, liberis ejusmodi privilegium dedimus, ut in parentum locum succedentes soli tertio gradu constituti cum illis, qui primo et secundo gradu sunt, ad hæreditatem vocantur, illud manifestum est, quod defuncti patris et masculis et feminis sive ex patre ex matre sint, præponantur, licet illi quoque tertium similiter cognationis gradum occupant.

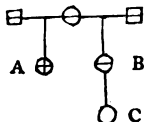
§ 1. Si vero defunctus neque fratres neque fratrū liberos, ut diximus, reliquerit, omnes deinceps ex latere cognatos ordine ad hæreditatem vocamus, secundum unius cujusque gradus prærogativam, ut propinquiores gradu ipsi reliquis præponantur. Si vero multi ejusdem gradus inveniantur, pro numero personarum inter eos hæreditas dividatur, id quod leges nostræ in capita appellat.

² It is an error to suppose that half brethren inherit together with ascendants. P. I. Birkner, diss. larva absurdæ sent. de succ. unilat. cum ascend. detracta, Alt. 1774.

General rule.

The general rule is, that he who only succeeds to his parents *plene* in the first class, succeeds to his uncle in the second.

Naturalis.



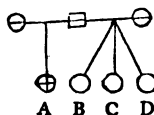
C being a *filius naturalis* cannot succeed his father *plene*, therefore he takes nothing from B.

In other words, these are consanguineous brethren, but do not succede as such, but as half brethren.

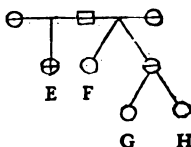
§ 1442.

The distribution in the third class.
General rule, half brethren in capita, their children in stirpes.

The rule for distribution in this class is,—
Half brethren *in capita*.
Their children *per stirpes*.



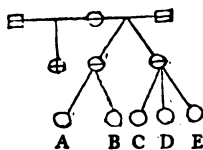
A's *relictum* is divided into third for B, C, D.



But if E die, the division becomes duplex only; F takes $\frac{1}{2}$ and G and H $\frac{1}{2}$ of $\frac{1}{2}$, = $\frac{1}{4}$.

Exception to the above rule.

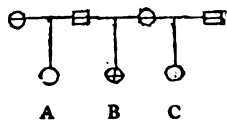
The exception to this rule is expressed *fratrum proles succedit in capita*; that is to say, that when there are no survivors, but the children of half brethren, these inherit *in capita*.



Here five shares are made.

No respect had to the origin of the property.

In this class also respect is not had to the origin of the property, when *uterini* compete with *consanguinei*,—these latter have no advantage on that account, inasmuch as the deceased derived his property from the father; nor the *uterini*, inasmuch as they derived it from the mother.



Although B had all or the greater part of his property from his father, A and C, nevertheless, divide the estate in equal moieties.¹

¹ Contra, Stryk. de succ. ab intest. diss. c. 1, § 22, seq.; Leyser, Sp. 423, med. 1; Walch, controuv. p. 393, Ed. III.

§ 1443.

On the continent, where the Roman law of succession is used, respect is generally had to the origin of the property,—the *consanguinei* first take the paternal, the *uterini* the maternal property out of the total, and divide the residue equally; this distinction is, indeed, to be found in the Code,¹ but not in the *Novellæ*.²

Otherwise on the continent.

In England, this holds with respect to land only,—those which came by the father shall descend to the heirs on the part of the father; and the lands which came by the mother shall descend to the heirs on the part of the mother. But with respect to personal estate, the statute requires an equal distribution amongst all such ascendants as are in equal degree.

In England as to law.

With respect to the succession to *personalty*, the law of England gives the half blood equal rights of succession with the whole blood contrary to the rule of the civil law;³ and is, moreover, extended to posthumous children of the half blood.⁴

In what respects the law of England deviates from the *Novella*.

As in the civil law, where brothers do not concur with nephews, the succession is *in capita*;⁵ nor is any distinction made between the whole and the half blood.⁶

§ 1444.

The fourth class comprises collateral relatives,—agnate or cognate, male or female, according to proximity of degree, in default of any of the above.

Collaterals, according to proximity of degree, succeed in the fourth class.

The general rule is, that the nearer excludes the more remote.

Influence of the period.

With respect to the period to be regarded in determining the proximity of degree, Justinian says,—*proximus autem, si quidem nullo testamento facto, quisquam decesserit, per hoc tempus requiritur, quo mortuus est is, cujus hæreditate quæritur. Quod si, facto testamento, quisquam decesserit per hoc tempus requiritur quo certum esse cœperit, nullum ex testamento hæredem extitutum. Quod quidem aliquanto longo tempore declaratur. In hoc spatio temporis sæpe accidit, ut proximior mortuo proximus esse incipiat, qui moriendo testatore non erat proximus.*⁷

¹ C. 6, 58, 13, § 2.

² Nov. 118; contra, Koch, l. c. § 82; Hunnius, resolut. p. 603; Fachin, contr. lib. 6, c. 5; Müller ad Leyser, obs. 670. Pro Stryk. and Leyser maintain the origin of the property is not in question, if children of half brethren alone claim; that that only is to be understood under paternal or maternal property which the deceased inherited immediately in the paternal or maternal line, and not that which he may have received from the relations of the father or mother, Glück, l. c. § 129.

³ Watta v. Crooke, 1 Strath. Donat. 608; Smith v. Tracy, 1676, 1 Mod. 209, 1

Ventr. 316, 2 Liv. 173, 1 Vern. 237, cit.; Crook v. Wyatt, 2 Vern. 124, 2 Frum. 112, 2 Ventr. 317, Show. P. C. 108, S. P. 12.

⁴ Burnet v. Man, Nov. 16, 1740, 1 Ves. 156.

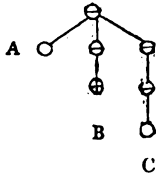
⁵ Janson v. Bury, 1723.

⁶ Dr. Wall had two sisters, Susanna of the half blood, and John, Mary, Dorothy, and Elizabeth of the whole blood, and both sisters died in his lifetime. The court decreed a moiety to the wife, and the other moiety to be divided into four parts,—one for the issue of Susanna, and the three for the issue of Elizabeth, Burn, 159.

⁷ Koch, l. c. § 11 a; Glück, l. c. § 19.

Proximior remotiorem excludit.

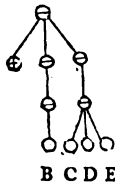
Hence, since *proximior remotiorem excludit*, it follows:—



A succeeds to the estate of B to the exclusion of C, because A is related to B in the third degree, C in the fifth.

Many of like degree succeed in capita.

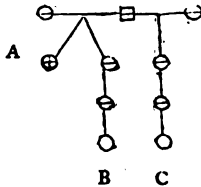
This, then, is the first class in which the degrees are reckoned, except in the case of ascendants; but where there are many of like degree, they succeed *in capita*.



Thus, A's estate undergoes a quadruplex division in favour of B, C, D, E.

Duplicitas vinculi not regarded.

The *duplicitas vinculi* is not regarded; and it is immaterial whether a relation descend from half or whole bred brethren.



A succeeds to D as well as C, notwithstanding C's grandfather being a full bred, and D's a half brother of the deceased.

No respect had to the origin of property.

Neither is any respect had here to the origin of the property, whether proceeding from the father or mother.

§ 1445.

Requisites for inheritance in this class.

To inherit in this class, the claimant must be—

1. Capable of inheritance; that is to say, in a capacity to inherit *plene* from father or mother, through whom the claim accrues.

2. None must intervene between the claimant and the deceased through whom the claim passes, who was not in a position, if alive, to have inherited *plene*.

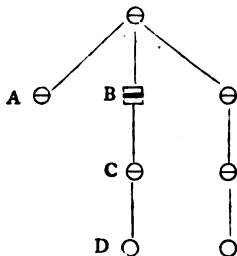
Thus, with regard to this latter rule, if B was issue of an incestuous marriage, C cannot succeed to A, because B could not have succeeded to his parents.

Now, if B be the natural son of his father, *filius naturalis*, C cannot succeed to A, B not possessing the full title to his father's property. But it is not required that there should, in the whole

line of relationship, be none born out of wedlock. If the illegitimate link in the line could have inherited *plene* of the mother only, through whom he is related to the deceased, the right of inheritance is not prejudiced by such illegitimate procreation.

An illegitimate link does not necessarily prejudice the subsequent succession.

Although C, father of D, is a *naturalis* of his mother B, D will, notwithstanding, succede to A.



For inasmuch as children born of concubinage succede to the mother *plene*, C could have succeeded his mother, *ergo* D can inherit from A.

However remote the relationship with the deceased of any decedent may be, yet he inherits; nor is there any restriction to the tenth degree, as some urge on the passage *hoc loco et illud necessario admomendi sumus, adgnationis quidem jure admitti aliquem ad hæreditatem etsi decimo gradu sit*,¹ that this is merely used *exempli gratiâ* appears from the expression applied to the *adgnati*² *etiam si longissimo gradu sint*, decimus being simply used to signify very remote.

Remoteness of relationship does not prejudice the succession.

§ 1446.

In a former title³ it has been shown what actions can be brought in cases of testamentary succession, for the purpose of impeaching or supporting a testament, which will be found to be the *querela inofficiosi testamenti*, *querela nullitatis ex jure antiquo* or *ex jure novo*, and the *bonorum possessio contra* or *secundum tabulas*. It now remains to be seen what remedies the intestate heir has against other parties who are in adverse possession of the inheritance. This remedy is termed *hæreditatis petitio*, and lies against the possessor *pro hærede* or *pro possessore*, praying that the petitioner be declared the true heir, and that the actual possessor be required to deliver up the *corpus hæreditatis cum omni causâ*, or together with all that appertaineth thereunto.

The hæreditatis petitio, a remedy against third parties in adverse possession.

lies pro hærede, or pro possessore:

The *hæreditatis* is an *actio universalis mixta*: *universalis*, because it concerns an *universitas juris* or an entirety of things, viz., the whole inheritance; and *mixta*,⁴ because, as regards the inheritance, it concerns a *res*, and therefore is *realis* in its nature; and *personalis*, because the action arises out of an obligation, and

and is an actio universalis mixta.

¹ I. 3, 5, § 5.

² I. 3, 2, § 3; Koch, l. c. § 99, ibique citat.; Glück, l. c. § 133, ad fin.

³ Tit. xii. § 1293.

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⁴ For Bachov's objection to this term, tract. de act. Disp. 2, th. 7; for answer, vid. Höpfner, in Hein. § 1092.

demands an account and damages as founded upon this double basis ; it is, therefore, both *realis* and *personalis*, and consequently *mixta*, or composite, and partaking of the nature of both *jura in rem* and *jura in personam*.

§ 1447.

Where this
action lies ;

This action does not lie until the death of the deceased can be attested and certified by witnesses,—or by a document of the authority, be such the parson of the parish or of others ; but in the case of one who has disappeared, and of whom no traces can be discovered, satisfactory proof of death must be given.¹

against whom.

This action lies against him who is in possession of the inheritance, or of a part thereof, or of something appertaining thereunto, *qui pro possessore* or *pro hærede possidet* ;² but it will not lie against him who possesses *titulo singulari* as a legatee.

The possessor
pro possessore
does not allege
himself to be
heir ;
but the possessor
pro hærede does
so.

Whoso possesses the inheritance and does not maintain, that he is the heir, notwithstanding his inability to allege any other title, or alleges one which is evidently null, is said *pro possessore possidere*. Whoso, on the contrary, maintains, that he is the true heir, is said *pro hærede possidere*. Lastly, whoso maintains, that he has bought the object in question, *pro empto*, has received it as a gift, *pro donato*, or by way of exchange, *pro permutato*, is said *titulo singulari possidere*. Thus it is clear, that that action lies *pro possessore* or *pro hærede*,—for the former has no title at all, and the latter maintains he is the heir ; as soon, therefore, as the true heir proves his right ; both are defeated by some title or a better title respectively.³ The case of the *possessor titulo singulari* is, however, different, for he does not question the heir's right, but simply confesses in avoidance, alleging, that although the petitioner is heir, yet, nevertheless, the object was not the property of the deceased, or was already alienated by him in his lifetime, hence nothing is gained in this case by the *hæreditatis petitio* or proof of the heirship, which is in fact admitted ; the proper action in such case is the *rei vindictio*,⁴ in order to demonstrate a property in the object in question ; but, nevertheless, the *hæreditatis petitio* will lie against him who has fraudulently, *dolose*, ceased to possess,—for such person is still looked upon as possessor.

Possessores pro
titulo singulari.

§ 1448.

Object of the
hæreditatis
petitio.

The prayer of the *hæreditatis petitio* is for deliverance of the inheritance, *cum omni causa*. If the possessor of the inheritance

¹ The German practice allows seventy years to be reckoned from the birthday of a person having so disappeared, and then adjudges him *pro mortuo*, because he ought to be dead by the new testament.

² Struv. exerc. 10, th. 47.

³ Branchu, obs. c. 6 ; E. F. Hommel, in epist. de mirabili Ulpiani impostura existimantis adversus eum qui pro possessore possidet, non rei vind. sed hæreditatis peti-

tionem instituendam esse, Lips. 1759 ; Id. Rhap. Quest. obs. 675, hold it an error of the elder jurists that they permitted this action against one who possesses *pro possessore* after the above declaration, and that it only lies against a civil or prætorian heir under the edict B. P. ; sed vid. Höpfner in Hein. § 706.

⁴ Vinn. Quest. sel. 1, 23 ; Oelze, progr. de act. real. adversus quemcumque possessorem non competente, § 11.

have possessed in good faith and honesty, *bonâ fide*, he is only required to deliver up what he actually possesses, and that whereby he is a gainer; that is to say, if, during the occupation, emblements to the amount of 1,000 aurei have accrued to such possessor, by reason whereof he has expended so much less of his own property, he may be said to be a gainer by 1,000 aurei, and must pay over just so much to the true heir. But such *bonæ fidei possessor* is not answerable for loss, extravagance, or destruction; the *malæ fidei possessor*, on the other hand, is not only answerable for all these contingencies, but, moreover, for *fructus percipiendi* or mature growing emblements, which he is bound to restore.

Liability of the bonæ and malæ fidei possessores respectively.

§ 1449.

The *hæreditatis petitio* is duplex in respect of its form, and is termed *qualificata*¹ when involving a testament, hence the *querela nullitatis* and *inofficiosi testamenti* are *hæreditatis petitiones qualificatæ*: the *hæreditatis petitio simplex*, on the other hand, embraces every other prosecution of the right of inheritance arising either out of wills, the laws, and the like.

The descriptions of hæreditatis petitio: qualificata or simplex;

In respect of the object, the *hæreditatis petitio* may be *partitaria*, on the prayer of one to be acknowledged as co-heir, and that the possessor do deliver his share to him.²

in respect of the object, it is partitaria;

In respect of its legal basis, it may be *civilis* when prayed by the civil heirs, or *possessoria* when prayed by the prætorian heir. He, therefore, who has already prayed the *B. P.* under the edict and obtained a decree, can institute this suit against the possessor of the inheritance, but it is not to be confounded with a simple possessory action, being merely a mode of enforcing the prætorian decree.

in respect of its legal basis, it is civilis or prætoriana;

The *hæreditatis petitio fidei commissaria* belongs to the particular species of actions on inheritances, and is instituted by fidei commissary heirs under the following presumption:—Let it be supposed that the *hæres fiduciarius*, not being in possession of the inheritance, is not in a position to deliver it to the *hæres fidei commissarius*. In such case, the trustee administers to the estate merely in word, and restores it by mere word to the *cestuique trust*, who is then in a position to institute the *hæreditatis petitio fidei commissaria* against such third person as may be in possession of it.³

in respect of its nature. Hæreditatis petitio fidei commissaria.

§ 1450.

Every heir is bound to his co-heirs duly to administer the inheritance which may be in his possession, and to divide it with his co-heirs at their request. As the different modes of division all

Duty of administration as regards co-heirs.

¹ This is a modern term, convenient for the sake of more clear distinction.

² It lies not only against him whom the petitioner lets pass as a co-heir, but also

against one to whom the petitioner acknowledges no heritable right.—P. 5, 4, 1, § 1; Voet. *ibid.* § 1.

³ § 1345, h. op.

partake more or less of like properties, whether effected judicially or extrajudicially, but the whole question of partition is more or less involved¹ in the present examination.

The six modes
of partition.

The partition may be effected by the deceased *immediately*, by testament, codicill, or *inter liberos*;² or *mediately*, by confiding the distribution to a third party.³ Or the heirs themselves may partition the inheritance in person or by an arbitrator.⁴ Lastly, the heir may effect the partition judicially by instituting a suit *familiæ herciscundæ* against a co-heir, in which case, the judge will assign the due proportions;⁵ but an extrajudicial partition confirmed by the judge, does not amount to a judicial division.⁶

§ 1451.

Rules for partition.

When partition
is by deceased.

Estate to be
ascertained.

Debts generally
not assignable.

Reference of
creditor to a
particular heir.

Capital remain-
ing as common
fund.

The first step to be taken, by whoso will take a part in the division, is to prove his heirship;⁷ nor can anything be divided over which the deceased had not full right of disposition, and which has not passed as an inheritance. The first step, however, is to sever everything which does not strictly belong to the estate; excluding whatever has become forfeited to the fiscus by way of penalty,⁹ and whatever a private individual is precluded from possessing as such.¹⁰ Generally, therefore, and upon the same principle, the debts of the deceased cannot be assigned legally so as to obligate any heir or creditor, either by the judge or the heirs, or even by the deceased himself,¹¹ distributing them contrary to their apportionment, according to such imaginary heritable shares,¹² as follow in the due course of law; the general admissibility of the *cessio* or right of assignment, however, allows a separate assignment of claims (*choses in action*); and when necessity requires it, even in the case of judicial partition.¹³ The deceased may refer a creditor, for his advantage, to a particular heir to the estate, in so far as he is authorized to burden such heir with legacies; but, of course, he must do so according to the form appertaining to legacies, and not by contract;¹⁴ but the creditor is, on his part, not bound to confine himself to the person designated. The partition may be made by allowing the capital to remain as a common fund, the produce thereof to be divided; or by making the object over to a third party, for a price to be agreed upon and distributed; or as a set off against a claim the creditor may have on

¹ Voet. de fam. hercis. com. T. 2, tit. 10; Grass, de arbit. fam. hercis. Gebauer de herite cito ob inæqual. in melius reform (op. T. 1).

² § 1229, h. op.

³ Voet. Com. T. 2, 10, § 5.

⁴ C. 2, 3, ult.

⁵ P. 10, 2.

⁶ Struben, 5, B. 127, Bed.

⁷ P. 10, 2, 1, § 1.

⁸ C. 3, 36, 17.

⁹ P. 49, 14, 4; vide et post de Pignor. versus fin.

¹⁰ P. 10, 2, 4, § 1.

¹¹ An exception is found in P. 16, 2, 16; P. 29, 1, 17, § 1; Voet. l. c. 2, 29, § 23, 24.

¹² P. 2, 15, 3; P. 17, 1, 45, § 2; P. 31 (2), 69, § 2; C. 2, 3, 25.

¹³ I. 2, 20, § 21; P. 30, 44, § 6; P. 30, 75, § 2; C. 6, 37, 18; Crell. de divis. nom. in judic. fam. hercis. Vit. 1743.

¹⁴ P. 30 (1), 69, § 2.

other objects. The first and second case raise the questions of the claims of a co-heir, who has suffered eviction of the thing in question. Now, if the deceased have himself made the apportionment, the co-heir must in general consent to eviction; but where the apportionment is after the manner of a pre-legacy, the heir can insist on eviction conditionally only, that is, so far only, as he could in the case of any legatee who may suffer eviction of property proved to belong to another; but he can insist on eviction unconditionally, if his *portio legitima* be infringed thereby.¹

Rights of co-heirs in cases of eviction suffered.

Apportionment by way of pre-legacies.

If, on the contrary, the apportionment have been made after the deceased's death, it is to be placed upon the same footing as bargain and sale, and the heir retains his claims for eviction;² in cases where the distribution has been made by the deceased, action can only be brought for infringement of the *portio legitima*.³ The judicial apportionment is only impeachable on the ground of an unequal distribution for fraud, but never on the ground of its being unjust after it has come into legal operation. In like manner, extrajudicial partitions, even those of an arbitrator,⁴ can be impeached as well on the ground of fraud as that of extraordinary lesion; but such as do not come within this definition cannot be taken into consideration.⁵ Other grounds of impeachment of judicial sentence and contracts are, of course, not excluded here.⁶

Where apportionment is made after the testator's decease.

Judicial apportionment only impeachable for fraud. Extrajudicial for fraud and lesion.

§ 1452.

Another action, termed the *actio familiæ herciscundæ*, is also incidental to inheritances, and presumes—that the inheritance belongs to many co-heirs;—that one of such has already been in possession of it and administered it;—that such person or the other co-heirs desire its distribution; and whoso brings suit with this object, maintains an *actio familiæ herciscundæ*.

The *actio familiæ herciscundæ*.

The origin of this action is extremely ancient, the first mention of it being made in the Twelve Tables,⁷ which provide *nomina inter hæredes pro portionibus hæreditariis erecta cita sunt, cæterarum familiæ rerum erecto non cito, si volent hæredes erectum citum faciunt*. *Prætor ad erectum ciendum arbitros tris dato*, that is, let all choses in action (obligations due and rights of action) be distributed among the co-heirs rateably according to their hereditary portions. Let there be no division made of the remaining available assets of the estate; but if the heirs so require, let distribution take place. Let the prætor appoint three arbitrators to divide the integer. Which is to be thus explained,⁸ that all choses

History of the origin of this action, and text of the Twelve Tables, with explicative commentary.

¹ P. 10, 2, 33; P. 32 (2), 77, § 8; sed vide Glück, Pand. 10, B. S. 107-111.

² P. 10, 2, 20, § 3 & 66, ult.; C. 3, 36, 14; C. 3, 38, 1.

³ C. 3, 36, 10.

⁴ Thib. Pand. § 500, ibique cit. si ultra dimidium lædatur.

⁵ C. 3, 38, 3; P. 10, 2, 36; P. 42, 1, 27; C. 4, 44, 2 & 8 varying arc—Voorda,

elect. c. 26; Gebauer, l. c. Püttmann, prob. c. 7; Glück, Pand. 10, B. S. 734; Cocceii, l. c. 2, 10, 6 & 7; Meurs de inæqual (Oelrichs Th. nov. vol. 3).

⁶ P. 4, 4, 7, § 4, 11 & 12; Id. 8, 9 & 16, § ult.

⁷ I. Gothofr. fr. XII. Tab. v.

⁸ Jan. Vinc. Gravina de XII. Tab. p. 326; ap. Hein. Synt. A. R. J. 3, 28, 8.

in action should be divided, *ipso jure*, among the co-heirs in proportion to their shares in the inheritance assigned them respectively by law, and that no contract should be entered into among such co-heirs, for a division which may not be rateable as such shares; the operation of which is to except legatees from the burden or benefit of such actions,—for being singular successors, they are not in the position of heirs. The other available assets of the estate formed a species of common fund, or *societas*, for the heirs; but it being a maxim that none should remain a member of any partnership against his consent, it was permissible for any one to quit it,¹ to which end the action for division of the inheritance was instituted; and the prætors, thereupon, assigned three arbitrators, who should settle the share to which each was entitled.

Derivation of the expression *familiam herciscere*.

Various explanations have been attempted of the term *familiam herciscere*,—that of Festus,² however, appears preferable. *Familia*, in one of its significations, denoted the estate left by the deceased;³ *ercere*, *erctus*, in the now obsolete language of that period, signified entire, and is, perhaps, connected with the Greek word ἔρκος, a fence or bulwark, consequently, that which is hedged about and so separated from that which surrounds, it being the conception of an integer;⁴ this root, remarks Festus, is still, perhaps, traceable in the word *coerceor* (coerceo), *coercitum*, *erctum*. *Ciere* signified to divide, hence *familia ercta non cita* will signify an integral and an undivided inheritance, out of which, in later ages, the word *erciscere* or *herciscere* was corrupted and compounded, and used by Cicero⁵ and Apuleius.⁶

§ 1453.

This action only available by one established to be co-heir.

This action, therefore, as well in its origin as in its subsequent use, was only available by a co-heir, consequently, if the defendant does not admit this quality in the plaintiff, he cannot sue him in this form; hence the plaintiff must first establish his co-heirship *hereditatis petitione partiaria*, and the *possessor singularis*, *pro empto* for instance, is not liable to this action, as possessing *titulo singulari*.

Its object partition.

The object being partition, this action does not apply to active and passive debts, for these are already distributed, *ipso jure*, among the co-heirs; thus, if the intestate have left 1,000 *aurei* outstanding debts and two heirs, each has to pay 500; in like manner, if there be 1,000 *aurei* due to his estate, each heir will have to receive 500 without any agreement being required. This action does not lie for things prohibited.

¹ P. 17, 2, 1, § 1; Id. 14.

² Ad voc. *erctum*.

³ § 371, h. op.

⁴ Itk

⁵ De orat. 1, 56; it is evidently, therefore, not a corruption of Trebonianua.

⁶ Meham. 6, sub. *extrem*.

§ 1454.

The *actio familiæ herciscundæ* lies *utiliter* by *hæredes fidei commissarii*, arrogated minors, and for the *quarta Divi Pii*, and by the *familiæ emptor*, but only against heirs,¹ and is guided by the following rules:—

Actio fam. hercisc. when available equitably,

In the first place, this action is, in the first place, only competent to such as have free and full disposition over their property. The party sued must defend,—nor does the tutor require the decree of a magistrate for that purpose;² and a curator is appointed for defendants being absentees.³

by such as have full disposition of their property,

In the second place, the action being universal, cannot be instituted repeatedly, except by a co-heir omitted in the partitions.⁴ *Actio communi dividundo* is, therefore, the only one which will lie in such case; but the *actio familiæ herciscundæ* is not barred by the partition having been effected extrajudicially.⁵

and cannot be instituted repetitively,

In the third place, although the object of the action is distribution, yet, nevertheless, the personal duties and claims of the administrator of the estate may incidentally become a question;⁶ in which case, it will be ruled by the principles applicable to the *actio communi dividundo*.⁷

when following the rules of *communi dividundo*.

In the fourth place, all accessory things follow the principal object, and all undistributed portions of the estate must be delivered to the heir in chief, judicially apportioned, or entrusted by lot or consent to some one heir or other person.⁸ The judge must assign the residue requiring to be distributed (if no understanding by reciprocal exchange of different objects can be effected),⁹ to him, of the co-heirs, who bids most; or to such of them as, in case of equal offers, has the greatest interest in the matter.¹⁰ But if the heirs will not bid against each other, the judge must direct a public sale of the object;¹¹ or, if the co-heirs object to this course, effect a compromise by division of the rights on the objects.¹² If the judge have divided many objects into portions where this could not be effected, or several co-heirs have bidden equal sums, a decision must be arrived at by lot; but this measure is to be resorted to only in cases where the judge cannot found a decision on any reasonable basis;¹³ and he must endeavor to render the partition as little prejudicial as possible to third parties.¹⁴

Accessories follow the principal.

Residue assignable by judge, according to certain rules.

¹ P. 10, 2, 2, § 1; Id. 18 & 40.

² P. 27, 9, 7, pr.; C. 5, 71, 17; Voet. 2, 10, § 15.

³ C. 3, 36, 17.

⁴ Id. et P. 10, 2, 20, § 4 & 44, § 2.

⁵ C. 3, 36, 11 & 21; P. 10, 2, 32.

⁶ P. 10, 2, 19 & 22, § 4 & 44, § 3 & 56.

⁷ Vid. Thib. Pand. § 716.

⁸ P. 10, 2, 4, § 3; Id. 5; C. 1, 7, 68, 2.

⁹ I. 4, 17, § 4; P. 10, 2, 2, pr. § 1, 2, 3; Id. 25, § 10.

¹⁰ P. 10, 2, 22, § 1 & 32, § 1; C. 3, 37, 1.

¹¹ P. 10, 2, 22, § 1 & 55; C. 3, 36, 1 & 3; Puf. T. 4, obs. 110; Struben, 2 B. 28 Bed.

¹² P. 7, 1, 16, § 2 & 6, § 1.

¹³ C. 6, 43, 3; P. 10, 2, 5; et vide P. 2, 14, 8; C. 1, 3, 47, in fin.; Vian. quest. sel. c. 35, l. 1.

¹⁴ P. 10, 2, 25, § 6; Voet. l. c. § 23. In many places in Germany particular statutes confer upon the parents or wife the right of apportionment, and to the husband, or to the cadet, what is termed the *Kührecht*.—Thib. l. c. § 881; Hellfeld, jurispr. § 733.

Where distribution is suspended by the deceased.

In the fifth place, if the deceased prohibited distribution for a short period, the *actio familiæ heriscundæ* must be suspended so long;¹ and

Clubbing of suits.

Sixthly, it is to be observed, that several inheritances may be included in one action.²

§ 1455.

Collatio or hotch potch.

Occasionally a *collatio*, termed in English a hotch potch, must be made in order to effect a division; that is to say, every heir must account for what he has received from the deceased, or acquired through having been qualified by him so to inherit.

Gifts inter vivos.

If children inherit of their parents, and have received something from them during their lifetime, *inter vivos*, without it, however, having been intended that they should receive such benefit over and above their inheritance, they are under the obligation of bringing this into account to re-establish the equality, this being termed *conferre*, whence *collatio*.

Founded on the prætorian jurisdiction. Introduced to equalize the sui and emancipati.

The *B. P.*, granted prætorianly to emancipated children, was the source of this collation or hotch potch, because, inasmuch as they now inherited together with the *sui* who had been acquiring for the father; while the *emancipati* had, in the mean time, acquired for their own account, by which the *sui* were placed at a disadvantage, —to remedy this, the prætor decreed that, if *sui* and *emancipati* inherited together, the latter should bring into hotch potch (*conferre*) that which they had acquired since the emancipation; but that *emancipati* and *sui* should not confer with each other respectively, that is, if all were *sui* or all *emancipati*, nor even when both existed, so long as the competition of the *emancipati* did not prejudice the *sui*.³ But inasmuch as by the new law a *suus* no longer acquired everything for his father, collation became a dead letter in the above case;⁴ nevertheless, although varied in two respects by imperial constitutions, it still obtains quoad every descendent who succeeds as intestate or direct testamentary heir, and who is still bound to confer whatever he had received from the deceased. When it is a question of a descendent competing with such, the rule is altered in its extension as to the testamentary succession of children, to whom it formerly applied in cases of intestacy only, for instance, as regards the *dos* and *donatio propter nuptias*;⁵ and in as far as the improved capacity of acquisition granted to the *sui* prejudiced the *emancipati*.⁶

¹ P. 17, 2, 1 & 70; P. 10, 3, 14, 2.

² P. 10, 2, 25, § 3-5; P. 17, 2, 52, § 14. As to the disputed extent of this right, vid. Mühlenbruch, Pand. T. 3, p. 362, n. 16.

³ P. 37, 6, 1, § 3, 4, 5; Vinn. l. c. c. 3, 4.

⁴ Bach. hist. Jur. Rom. 2, 2, § 12;

Unterholzner, hist. doct. Jur. R. de collationibus, Alt. 1809.

⁵ C. 6, 20, 17; v. Tigerström, dotatr. 1 B. S. 388-398.

⁶ Nov. 18, 6; Thib. P. R. § 882, ad fin. et 884; Franke, a. a. O; contra, Ross, hist. Erbrecht. § 414-444; Mühlenbruch, Pand. T. 3, p. 352-357.

§ 1456.

Collation is based upon the presumed desire of the parents, under which term is included all ascendants, that their children or descendants should be equally dealt with, whether *ex testamento* or *ab intestato*, or that they would have been so, failing a testament.¹ The more remote must collate with the nearer; the grandson, not being his father's heir, must bring into hotch-potch everything which his father had received from his father, and must himself have collated.² Hence, the grandson, as heir of his grandfather, must collate everything which may have been given by the grandfather to his deceased mother; and, after the death of the mother, the marriage portion which has accrued to her widower by the statutory succession.³

Principles of the collatio;
of descendants;

Descendants are, however, not liable to collate with ascendants, collaterals, or third persons, nor are they obliged to collate with each other.⁴

of ascendants
and collaterals;

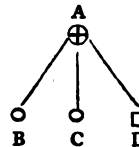
A descendent, not being heir, is exempt from collation;⁵ and, in like manner, if and in so far as he is not, without any fault of his own, a gainer by what he has received at the period of the deceased's death.⁶

If the creditors of an insolvent descendent who administered to the estate come into his place, they are bound to collate just as much as they are at liberty to demand collation from other descendants;⁷ but in cases where others, in virtue of their own right, come into the place of one who is no longer a participator, the obligation which such party was under to collate, does not devolve upon them.⁸

of creditors.

Since, then, no collation takes place when parents succeed their children or collaterals each other, but only when some or all of the children have received something or other from their parents *donatione inter vivos*, it results that, if A die, and B during his lifetime had received 1,000 *aurei* to start in trade, C 2,000, and the daughter D 4,000 as a marriage portion, these various sums are to be deducted from their several shares,—board, lodging, clothing, and the like, are not brought into account, or any—

Donationes inter vivos collated.



Not alimony;

¹ Voet. 37, 6, § 2; Pfizer, § 78.

² Nov. 118, 1; Brim. de nepote ea, quæ parens accepit in univers. conferente, Struben, 4 B. 83 Bed.; Koch, Grundl. einer neuen Theorie, v. d. success. ab intest. (ed. 8), § 3, 1 Anm.; contra, Günther de nepote non conferente, Helmst. 1796, et in part. Müller ad Leyser, obs. 637.

³ Malblanc, princ. § 778.

⁴ C. 3, 38, ult.; C. 6, 20, 12-16, 17-19; Thib. Abhand. in Archiv. f. civ. Praxis, 5 B. 3 Hft. § 330-333; contra, Unterholzer, hist. doctr. jur. Rom. de coll. Altorf. 1809; varying as to German law,

are J. H. Boehmer, de conf. bonis sec. jus Sax. Hal. 1734 (Exerc. T. 5, n. 81.)

⁵ P. 37, 7, ult.; C. 3, 36, 25; Barth. de benef. filiae abst. hæred. sat. Lips. 1688; Pfizer, § 6162.

⁶ P. 37, 6, 1, § 23 & 2, § 2; C. 6, 10, 6 & 20; Nov. 97, 6; Pfizer, § 245-251; Malblanc distinguishes between rebus æstimantis et non æstimantis.

⁷ Puf. T. 3, obs. 186; contra, as to the second case, Voet. l. c. § 26; but he forgets the representatio activa in the body of the creditors, Thib. P. R. § 883, ad fin.

⁸ Heidlb. Jahr. 6, 1808, 1 st. § 114, 115; partially contra, Pfizer, § 100-101.

nor donationes
mortis causæ.

thing else which comes under the head of maintenance :¹ thus the expense of education in professions, books,² or in a trade, are considered as coming under that head, so long as they do not exceed what is necessary ;³ and perhaps, also, the ransom of a captive son. Secondly, whatever the children may have received *mortis causâ*,⁴ and prelegacies, are excepted ; because the basis whereupon collation is founded, viz., the presumed equality of the shares, no longer exists, it being evident by the fact that the parents did not intend to observe an equality.

§ 1457.

Collation of the
peculia profec-
titia, adventitia
ordinaria.

Emancipated children collate with the *sui*, the *peculium profectitium* allowed to be retained by them on emancipation, and all the *procedes*⁵ of things belonging to the *adventitium ordinarium*.

But no children collate things in respect whereof the *sui* have now equal hereditary rights with the *emancipati* ; hence not such *peculia* as are at the free disposal of *filiî familias*, and the dominion of the *peculium adventitium regulare*.⁶

Castrensia quasi
castrensia.

Peculia castrensia and *quasi castrensia* are likewise excepted, in so far as they be not derived from the deceased, but have been acquired by the children independently ; nor even the *adventitia* under similar circumstances,—no, not even when they have been given to the children by the parents in virtue of a *privilegium* : for instance, if the father have given his son 500 *aurei* to fit him out for the army—nor whatever children have received from parents in the evident intention that they should have it beforehand ; for then the principle of the collation does not operate, but applies to simple presents—they must, however, be *donationes simplices*,⁷ not *donationes ob causam* ; under which latter head come the cases of money advanced to start in trade, or as *dos*, or *donatio propter nuptias*, as before observed, and which must therefore be brought into hotch-potch, except the contrary be stated.⁸

Donationes sim-
plices not col-
lated,
but ob causam.
Dos et propter
nuptias collated.

Now if a parent give one child a *dos*, or *donatio propter nuptias*, and make another a gift in order to equalize them, Justinian⁹ says —*Jubemus ad similitudinem ejus, qui ante nuptias donationem, vel*

¹ P. 10, 1, 50 ; vide Thib. P. R. § 884, n. 4, ibique citt.

² J. F. Wernher, diss. de coll. circa lib. stud. grat. comparat. in ejusd. disq. jur. coll. nov. p. 128, seq. ; I. I. Schaeffer, diss. de sumpt. stud. Frft. 1736 ; Mascov. l. c. § 3, seq.

³ Hellfeld, § 1611 ; contra, Müller ad Leyser, obs. 651 ; sed vide obs. 301, ejusd.

⁴ C. 8, 51, 17 ; sed quære ? Franke, a a o, p. 177 ; Pfizer, p. 271.

⁵ C. 6, 20, 17 & 21 ; Basilica, L. 43, Tit. 36 ; Harmen. Prompt. L. 5, T. 25 ; Franke, l. c.

⁶ P. 17, 2, 52, § 8 ; P. 36, 1, 54 ; P. 37, 6, 1, § 15 ; C. 6, 20, 12.

⁷ P. 23, 3, 1 ; P. 5, 3, 20, pr. § 1 ; C. 6, 20, 20, § 1 ; Franke, l. c. p. 402-412.

⁸ C. 6, 20, 13 & 20, § 1 ; Müller ad Leyser, obs. 638 ; Franke, l. c. p. 239 241, dispute upon this matter.

⁹ C. 6, 20, 20, § 1 ; sed vide Id. § 13 ; Beck, de collat. bon. c. 4, § 99, ibique citt. ; Wernher, pt. 1, obs. 317 ; G. Mascov. diss. de coll. bon. § 30, in opusc. p. 296 ; Walch, contr. p. 978, ed. 3, ibique citt. ; C. F. Paelicke, diss. de don. simpl. in hæred. pat. non conf. Helmst. 1762 ; Puf. T. 1, obs. 171 ; de dote vid. F. Kämmerer, 1 B. Roet. et Schwerin, 1817, Nro. 7. Some jurists, however, are of opinion that all presents whatever are liable to collation.

dotem conferre cogitur, etiam illam personam, quæ nulla dote vel ante nuptias donatione data, solam simplicem donationem a parentibus suis accepit, conferre eam nec recusare collationem ex eo quod simplex donatio non aliter confertur, nisi hujusmodi legem donatur; tempore donationis suæ indulgentiæ imposuerit.

§ 1458.

The fact of the child being *sub potestate*, or *sui juris*, makes no difference: neither does any collation take place when the parents dispense with it, expressly or tacitly, so long as it does not infringe the *portio legitima*,¹ for nothing must be done whereby that legal share of the other children may be prejudiced, except indeed in the case of an exheridition valid in law, or what the deceased may by will have given one child more than another.²

The collation may be thus represented:—

The estate amounts to	.	.	.	5,000	<i>aurei</i> .
The son A has already received	.	.	.	1,000	"
The son B	.	.	.	2,000	"
The daughter D	.	.	.	4,000	"
Total				12,000	"

Collation, how calculated.

Which gives for each child a portion

amounting to	4,000	"
Then A takes	4,000	—	1,000	=	3,000	"
B takes	4,000	—	2,000	=	2,000	"
D takes	4,000	—	4,000		..	"

Children are not called upon to collate that which cannot be looked upon as a gain whereby they are enriched,—as, for instance, that which the deceased may have paid for an office not resaleable,³ or for the discharge of a debt contracted *titulo oneroso*; hence not a moderate *donatio remuneratoria*,⁴ nor that which, although of advantage to the children, was expended by the deceased,—as, for instance, the outlay for a bridal entertainment.⁵

Collation requires that the parties be advantaged.

§ 1459.

The collation is effected at the option of the party,⁶ either by delivery of the thing itself, or estimation of its value at the time of the deceased's death, deducting necessary and advantageous improvements in existence at the period of the collation.⁷ The

Collation effected in re or estimationis.

¹ Sed quære quoad tacitum Archiv. f. civ. Praxis, 2 B. 1 Hft. nr. 6.

² P. 10, 2, 39, § 1; C. 6, 20, 16; Glossa, ad C. 6, 20, 20.

³ P. 37, 6, 1, § 16; C. 3, 28, 30, § 2; C. 6, 20, 20, pr.

⁴ Thib. P. R. § 884, ibique ult.; Leyser, spec. 411, m. 5, 6; Müller ad eundem, obs. 645.

⁵ Carpzov, P. 3, Const. 11, Def. 21.

⁶ P. 37, 6, 1, § 12; C. 6, 20, 5; contra, Müller, obs. 641; Pfizer, § 193-201; sed vide Heidlb. Jahrb. 1808, 1 st. 118, 119.

⁷ C. 6, 20, 1, § 11 & 12; P. 37, 6, 11 & 20; P. 37, 7, 1, § 5; C. 5, 13, 1, § 11; contra Pfizer, § 202-241, 244-253-257.

conferent may, however, demand to retain whatever he may have received on relinquishing all claim to the inheritance.¹ Profits and interest are to be calculated from the moment when the obligation to collate accrues;² and should an heir refuse to collate,³ he may be deprived of his actions on the inheritance,⁴ and is exposed to legal measures. Should he, nevertheless, from circumstances not be in a position to collate at the time, he must give security that he will do so later.⁵

§ 1460.

When an ascendent, direct collation not within the province of the general law.

The question, however, arises as to in how far the deceased may direct collation to be had of things not within the general law of collation, as for instance, when that which was given proceeded from mere liberality, as the aliment which a child could draw from the produce of his property; in this case, collation may be directed, if done simultaneously with the gift.⁶ If, however, the father lie under the obligation of making this outlay, he is not at liberty to impose any conditions.⁷

¹ P. 37, 6, 1, § 12, hence also in case he abstain, C. G. Buner opusc. T. 1, nr. 35.

² Müller, obs. 640; Langenn et Kiri Eroert. 2 B. nr. 20; contra, Walch, jus contr. p. 403; Weissius (Pr. Zoller), ex quo tempore usuræ conferendor. sint petendæ, Lips. 1767.

³ P. 37, 7, 5, § 1.

⁴ P. 37, 7, 1, pr.; P. 37, 6, 1, § 10; C. 6, 20, 8 & 14.

⁵ P. 37, 6, 1, § 9, 10, 13.

⁶ C. 6, 20, 20, in. f.

⁷ Mascov. Diss. § 26; C. 2, 19, 11; contra, Lauterbach, coll. 37, 6, § 16.

TITLE XVII.

Jus Pignoris—Pignus—Hypotheca—Pignus Generale—Speciale—Voluntarium—Necessarium—Conventionale—Testamentale—Expressum—Tacitum—Pignus Judiciale sive Prætorium—Pignora Privilegiata—Sive Qualificata—Subpignoratium—Distractio Pignoris—Pactum Antichreticum—Collisio Creditorum—Jus Offerendi—Extinctio Pignoris—Actio Pignoratitia—Directa—Contraria—Actiones Hypothecariæ—Serviana et Quasi Serviana—Interdictum Salvianum et Quasi Salvianum—Unde vi—Actio Spolii—Interdictum uti Possidetis—Utrubi—Quod via aut clam—De Precario—Novi Operis
§ Nunciatio—Pawns and Mortgages.

§ 1461.

THERE is a diversity of opinion among commentators as to the position which the *jus pignoris* should occupy in a treatise on the civil law. The Institutes,¹ which were framed as an elementary work for students, and as a manual for inferior judges, bestows a passing notice of it under the title, *Quibus modis re contrahitur obligatio*; thus treating it in its bearing as a contract. In the Pandects² we find an entire book given to it, intitled generally, *De pignoribus et hypothecis et qualiter ea contrahuntur et de pactis eorum*, at the conclusion of the whole question of contracts; but it is notorious that no logical arrangement is adopted in the Pandects. The argument for considering it in the light of a contract is, that a contract exists between the parties that a certain thing shall be granted, or a grant understood of a right on the object pledged, as a security for an outstanding debt, and it is said to be *re*, because all those contracts are such which are perfected by the delivery of a thing;³ hence the *mutuum commodatum* and *depositum* are in like category. But it is not termed a real contract, because it gives a *jus in re*, for no contract gives other than *actio personalis*. Real actions accrue out of a *jus in re*, and no such right attaches on a pledge, which remains the property of the owner in the hands of another, who has a lien upon it for a contract of debt. Thus, a *mutuum* is a gratuitous loan, to be returned in like; a *commodatum*, the gratuitous loan of the use of an object; a *depositum* obligates the depositary gratuitously to keep safely the thing deposited; and in all these there is not necessarily a mutuality of advantage.

A *pignus*, however, is the deposit of a thing in consideration of something due; and if a contract at all, is ancillary to the loan. Almost all modern commentators agree, and Thibaut,⁴ no mean autho-

The *jus pignoris*
not a contract;

but ancillary to
a contract,

¹ I. 3, 14, 4.

² Höpfner in Hein. § 763-4.

³ P. 20, E. et.

⁴ P. R. § 781.

and an easement on the property of another.

rity, declares it is no contract, but a species of servitude on the property of another. He thus terms it from its similitude to services in which the dominion remains vested in the *dominus soli*; and the *jus itineris*, for instance, is a right upon the soil conceded by the owner, and based upon some contract; thus, under the so-called real contracts, Thibaut¹ enumerates only the *mutuum*, *commodatum* and *depositum*. It certainly, then, appears that a pledge is more like a service than a contract so termed real, which it only represents in the delivery of the object. No *rei vindicatio* lies for a pledge by the pawnee, for the property has never passed to him; and this was the difficulty under the old law, which gave rise to the various modes taken to remedy the insecurity to which pledges were exposed, and alluded to below.² Upon these grounds the law of hypothecation has been placed in the same category with *jura dominii servitutis* and *hereditatis* in the present work, instead of under that of real contracts, thus reduced to three.

The *jus pignoris* has no separate title in the *Institutes*.

Justinian's *Institutes*,³ then, contain no title which treats of the law of pledges and hypotheks, although such a title is inserted both in the *Pandects*⁴ and in the *Code*.⁵ The reason of this important subject having been so slightly touched upon in the *Institutes*, and included under the head of contracts, may perhaps be referred to the desire of rendering this elementary work as concise as possible; but, nevertheless, considered in its capacity of a contract, it is so peculiar in its nature, that it appears at least as deserving, even as such, of a separate title as *Emphyteusis*. In the present work, however, it is treated as constituting the fourth of the *jura realia*, which have already been remarked to be *jura dominii, servitutis, hereditatis, and pignoris*.

Is the fourth *modus acquirendi realis*. Definition of the *jus pignoris*.

Marezoll⁶ and Thibaut⁷ define the *jus pignoris*, in nearly the same words, to be "a real right, attaching on a thing belonging to another, granted to a creditor as security for his claim." Its nature consists in the right of the creditor to sell such property of another, and to indemnify himself out of the proceeds.

Its rise and progress.

The prætorian jurisdiction developed insensibly, in the process of time, a law peculiar to the *pignus*; for before the edict thus defined the law of pledge, the creditor was under the necessity of resorting to various fictions in order to make his security real and available on the property of the debtor; this was usually accomplished by delivering the object to the creditor as his sole and entire property, or by conveyance of what, in English law, is

¹ P. R. § 545.

² FK does not adopt the view of Thibaut because he had the honor of sitting under that great lawyer, or because he was one of his examiners, but because he thinks his arrangement in point of logic superior even to that of Trebonian.

³ I. 3, 15, § 4.

⁴ P. 20, 1.

⁵ C. 8, 14.

⁶ *Lehrbuch der Inst. des R. R. Leipzig, 1841.* This is an excellent elementary work, perhaps the best for a student to commence with; it is, however, not translated.

⁷ *Syst. des P. R.*

termed the legal estate, or by *cessio sub lege remanicipationis* or *sub fiducia*, which may be translated the equity of redemption; these fictitious modes of constituting a pledge are mentioned by Gaius, — *Qui rem alicui fiduciæ causa mancipio dederit, vel in jure cesserit, si eandem ipse possederit, potest usucapere anno completo etsi soli sit. Quæ species usucapionis dicitur usureceptio, quia id, quod aliquando habuimus, recipimus per usucapionem.*¹ The usucapion of a year and a day is, in English law, one of the incidents of pledges which, in default of the payment of the interest, must be redeemed within that time, or they may be distrained or sold to satisfy the debt. Gaius continues, — *Sed quum fiducia contrahitur, aut cum creditore pignoris jure, quo tutius nostræ res apud eum essent, siquidem cum amico contracta est fiducia, sane omnimodo competit usu receptio; si vero cum creditore, soluta quidem pecunia omnimodo competit, nondum vero soluta, ita demum competit, si neque conduxerit eam rem a creditore debitor, neque precario rogaverit, ut eam rem possidere liceret; quo casu lucrativa usucapio competit.*

Affected by
usucapion;

by the fiduciary
contract.

Herefrom resulted the inference of a regular pledge, the delivery of the thing to the creditor, with possession and the power of sale in case necessity should require that measure for realising the obligation. Nevertheless, so long as this right of detention on the part of the creditor was not protected by an *in rem actio*, even as against third parties, he possessed no real, perfect, and lasting security. To remedy this defect, the prætors granted the pawnee, at least for one particular case, an *actio* termed *serviana*, which acknowledged an action of real right in the possessor of the pledge to enable him to vindicate it as against every detentor.

The want of a
real action.

The *actio serviana*, which is
realis given.

*Item serviana et quasi serviana (quæ etiam hypothecaria vocatur) ex ipsius prætoris jurisdictione substantiam capiunt. Serviana autem experitur quis de rebus coloni, quæ pignoris jure pro mercedibus fundi ei tenentur.*² At a later period, this right of action was extended by the quasi servian action, whereby the law of pledge acquired a fully real character, and the possibility of making the claim on a pawn operative in law, without putting the creditor into absolute corporeal possession of the object itself accrued, and this was term a *hypotheca* or mortgage. *Quasi serviana autem est, qua creditores pignora hypothecæ persequuntur.*³

The quasi servian action given
as by an extension.

Where no possession was
given, pledges were termed
hypotheca.

§ 1462.

The word *pignus* is derived from *pugnus*, the fist, and is exactly translated by the German *Faustpfand*, or fist pledge; whereas the word pledge is derived from the low German *plichten* (*verpflichten*), which is the same as the high German *pflichten* (*verpflichten*), to obligate an expression of far larger signification.

Derivation of
the word *pignus*,

The word *pignus* is used in a triple sense; sometimes it serves to indicate the *contract* in which the debtor delivers to the creditor

which has a
triple signification:—

¹ Gaius, Com. 2, § 59-61.

² I. 4, 6, § 7.

³ Ibid.

- as a real security; an object, to the end that he may acquire a real right therein, keep it as a security, and return it when the debt shall have been paid.
- as a real right; Secondly, it is used to signify the *real right* itself, which accrues to the creditor as a security for his claim.
- as the object. Thirdly, *pignus* is the *object* itself upon which the creditor acquires such real right.
- Hypothek is in like manner triple. *Hypotheca* has, in like manner, a triple signification as a *pactum*, a *jus*, and a *res*.

§ 1463.

- Definition of *pignus*. *Proprie pignus dicimus, quod ad creditorem transit*, says Ulpian;¹ and in this passing to the creditor, it differs from a hypothek,—thus the same jurist continues, *hypothecam cum non transit, nec possessio ad creditorem*; this, then, is a mortgage. A pledge can be made available by the creditor without judicial intervention, for the remedy is in his own hands;² whereas a hypothek can only be realized by means of an action, and this is the true distinction. Hence it is erroneous to suppose, as some jurists do,³ that a *pignus* applies simply to moveables, an *hypotheca* to immoveables; a moveable can be hypothecated, and an immoveable can be pledged according as possession is or is not given to the creditor; for *pignus contrahitur non solum traditione, sed etiam nuda conventionione, etsi non traditum est*;⁴ here it is clear that Ulpian uses *pignus* in its generate sense, including both hypotheks and pledges, because Gaius⁵ says,—*Pignus a pugno; quia res, quæ pignori dantur, manu traduntur, unde etiam videri potest verum esse, quod quidam putant, pignus proprie rei mobilis constitui, and pignoris appellatione eam proprie rem contineri dicimus, quæ simul etiam traditur creditori maximè si mobilis sit*;⁶ because the possession of immoveables is not so readily transferred as that of moveables: thus Justinian continues, *ut eam, quæ sine traditione nuda conventionione tenetur proprie hypothecæ appellatione contineri dicimus*.
- Of a hypothek.
- Distinction between hypotheks and pledges lies in the delivery.
- Apparent discrepancy in Ulpian's definition explained.

§ 1464.

- Hypothek defined:— *Hypotheca* is a contract whereby one party grants to another a real right on his property, as security for a debt contracted; thus, Paulus says, *contrahitur hypotheca per pactum conventum, cum quis paciscitur, ut res ejus propter aliquam obligationem sint hypothecæ nomine obligatæ*.⁷ In like manner Isidorus⁸ tells us, though not with the same precision, *hypotheca est, cum res aliqua commodatur sine depositione pignoris, pacto vel cautione sola inter-*
- is a contract of pledges without delivery.

¹ P. 13, 7, 9, § 2.² I. 2, 8, § 1; C. 8, 34, 1, 3, § 1; C. 8, 28, 9.³ Walch, in controuv. p. 417, ed. 3; contra, Schulding, thea. controuv. dec. 75, th.⁴ Hellfeld, diss. de hypothec. mobil. c. 3, in opusc. p. 762, seq.⁵ P. 13, 7, 1 pr.; Ulpian.⁶ P. 50, 16, § 238, ff.⁷ I. 4, 6, § 7.⁸ P. 20, 1, 4.^{*} Orig. 5, 25.

§ 1465.

veniente.—The principal difference, then, between *pinus* and *hypotheca* consists in the actual possession remaining with the debtor,—a particular object, *ὑποθήκῃ*, *ὑπόθετα*, is subjected or obligated to another as security for the debt; hence it follows that that especial thing is more particularly liable than anything else belonging to the debtor, and differs from a *hypotheca* in name only—one having, so far as the remedy by action is concerned, no advantage over the other. *Inter pinus et hypothecam, quantum ad actionem hypothecariam attinet nihil interest. Nam de quâ re inter creditorem et debitorem convenerit, ut si pro debito obligata, utraque hac appellatione continetur.*¹ *Inter pinus et hypothecam tantum nominis sonus differt;*² that is, so far as the remedy by action is concerned.

Distinction between *pinus* and *hypotheca*.

In hypotheks, the dominion or legal estate passes to the creditor, but the usufruct or use remains with the debtor.

A hypothek may be granted in respect of part or the whole of any obligation whatever. *Res hypothecæ dari posse sciendum est, pro quacunque obligatione, sive mutua pecunia datur, sive dos, sive emptio vel venditio contrabatur, vel etiam locatio conductio, vel mandatum, . . . sed et non solvendæ omnis pecuniæ causa verum etiam de parte ejus, et vel pro civili obligatione, vel honoraria, vel tantum naturali:* it may be pure, conditional, present, or future, — *et sive pura est obligatio vel in diem vel sub conditione, et sive in præsentis contractu sive etiam præcedat; sed et futuræ obligationes nomine dari possunt.*³

May be granted in respect of the whole or of part of property.

May be pure, conditional, or future.

A hypothek can, moreover, be constituted on account of a man's own proper obligation or on the part of another. *Dare autem quis hypothecam potest, sive pro suâ obligatione, sive pro alienâ.*⁴

For the owner's obligation, or by him for that of another.

The *pinus* or *hypotheca*, which afterwards comes into the possession of the creditor (for then, in fact, it becomes a hand pledge) also has the important peculiarity of transferring to the creditor the burden or advantage, as it may be, of possession, and the duty of due diligence.⁵

§ 1466.

PIGNUS.

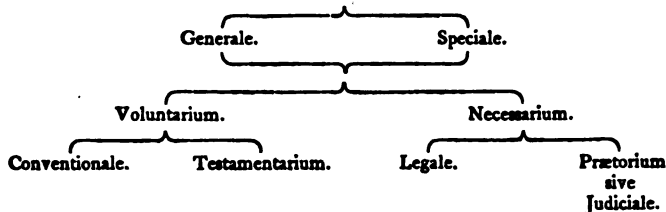


Table of the various sorts of *pinora*.

¹ P. 4, 6, § 7.

² P. 20, 1, 5, § 1; vide et P. 20, 4, 12, pr. et § fin.; P. 20, 4, 11, pr.; C. 8, 18, 8; Schulting, thea. controuv. dec. 75, th. 3; Boehmer, diss. de div. pign. et hypoth. jure, c. 1, § 13, in Exercit. ad Pand. T. 3, p. 831; Leyser, sp. 223, med. 1.

³ P. 20, 1, 5; Marcianus.

⁴ P. 20, 1, 5, § 2.

⁵ I. H. Boehmer, de diver. pig. et hypoth. jure, Hal. 1718 (Exerc. T. 3); Gesterding, § 129-132.

The *jus pignoris* is an accessory right.

The right of pledge being accessory in its nature is, in a great measure, dependent on the validity, defect, or conditions of the principal contract; and hence, a pledge given for a debt not due can be reclaimed.¹

When general.

The *jus pignoris* is *generale* when the debtor obligates his entire property; thus the formula, "all my moveables and immoveables,"² includes past, present, and future corporeal and incorporeal property in possession or in action,³ such things however as have been acquired in the place of those alienated with the creditors' consent⁴ are excepted; another presumption also is, that the debtor has excepted all tools of trade and furniture necessary to his subsistence;⁵ nevertheless, the creditor may disstrain these even if there be not otherwise wherewithal to satisfy his demand.⁶

When special.

The *jus pignoris* is otherwise *speciale*,⁷ and applies only to individual objects, and by no means to such things as the debtor may acquire in lieu thereof, except where the thing surrogated follows the conception of the ideal object, as in a *universitas servorum*, a flock or herd, or an open store, because exchange and variation is inseparable from such;⁸ but the same rule must not be applied to all *universitates rerum*.⁹

The general operation of both.

Both the general and special pledges have the same operation, even when they come into collision with each other;¹⁰ although the latter may have the preference, provided it do not prejudice the former.¹¹

It may occasionally happen that a creditor, in addition to his general claim, has also a special one on some one particular thing contained in the integer; the consequence of which is, that he is

¹ P. 13, 7, 9, § 1, 3-5; P. 14, 6, 9; P. 20, 1, 5, pr.; as to limited pledges, P. 20, 1, 14, § 1; P. 36, 1, 59, pr.; C. 8, 31, 2; P. 14, 6, 9, § 3; P. 20, 3, 2; P. 46, 3, 101, § 1; C. 4, 32, 4 & 12; vid. Weber, v. d. Nat. Verb. § 107; Seuffert, Erört. einz. Lehren, 2 Ab. th. S. 88-9; contra, Franke, Civ. Abh. Gött. 1826, nr. 2; Hepp. in der A. L. Z. 1832, p. 482-4; Rosshirt, Zeitsch. 2 Hft. S. 150-4; P. 20, 1, 25, & 33; Thib. Civ. Abh. p. 323-336; Seuffert, p. 85-7; Rosshirt, l. c. 135-7; contra, Weber, l. c. § 104; Glück, l. c. 14 B. § 864.

² Erleben, § 144; Lauterbach, coll. L. 20, T. 1, § 23; cont. Glück, Pand. 18, B. S. 219-222.

³ P. 20, 1, 34, § 2; C. 8, 17, 9.

⁴ C. 8, 26, ult.; contra, Vermehren in Arch. f. Civ. Prax. 13 B. 1 Hft. S. 29-33; sed vide Hepp. l. c. 1832, S. 512.

⁵ P. 20, 1, 6, 7, 8; Voet. 20, 2, § 4; Cocceii, eod. qu. 11; Huber, præl. 20, 2, § 1; Meissner vollst. Darst. et Lehre v. Stillschw. Pf R. Leipz. 1803, § 30; as to

testamentary, vide Musset de juss. legato spec. 1, Heid. 1810.

⁶ Huber, l. c. 20, 1, § 24; Westphal. § 37.

⁷ C. 8, 17, 9; cont. Merz. præz. Schrader de ver. indole, div. hypoth. in gen. et in spec. Tüb. 1818; sed vide Caplik de. gen. spec. alisq. hypoth. discr. Gött. 1820; Baumbach defends the Florentine reading, L. 2, qui potiores, Jen. 1820; Rosshirt, Zeitsch. st. nr. 1.

⁸ P. 20, 1, 13, pr. & 34, pr.; P. 20, 2, 9.

⁹ Thib. P. R. § 175, 784, n. f.; Bachov. 1, 5, n. 3; Voet. 20, 1, § 14; Leyser, spec. 223, m. 6, sp. 224, m. 6; Glück, P. 18, B. S. 229-34; Zimmern in Linde Zeitsch. 1 B. 2 Hft. S. 49-51; Gesterding, 392-95; Bolley, verm. jur. Auff. 1 B. nr. 19; Hoffmann, über den Einfluss allgemeiner Pfandrechte Darm. 1831, S. 69-122.

¹⁰ P. 20, 4, 2 & 7, § 1; C. 8, 18, 6; Wordenhof, de concursu, hyp. gen. cum spec. (Oelrichs, Th. nov. vol. 1, T. 2.)

¹¹ P. 49, 14, 47; C. 8, 14, 2; Alcf. de vir. hyp. gen. Heidelb. 1762.

compellable, if he have not contracted for the liberty to vary,¹ to distrain the special pledge first, whether the pledger himself, another creditor secured by pledge, or some third party² be in possession.

§ 1467.

All pledges presuppose a debt or obligation on account whereof it is given; security for which may, in addition to its being general and special, may also be voluntary or necessary.

When voluntary and necessary.

The *pignus voluntarium*³ is a constituted contract, *depositum hominis*, whether by the debtor himself, or by another on his behalf, or by last will; but the *necessarium* is the natural result of law, or effected *juris dispositione*: the voluntary is subdivided into *conventionale* and *testamentarium*, and both may be express or tacit.

The *pignus conventionale expressum* is founded on a *contractus pignoratitius* in pledges, or *pactum hypothecæ* in cases of hypothecation, and is constituted by the debtor declaring in express words that he grants a real charge upon a thing as a security for a debt incurred.⁴ The *pignus tacitum*⁵ arises in the presumption of a transaction, or from the implication resulting out of a special contract, such as signing the document, making over the pledge, or ceding the possession of an object to a creditor on account of his claim.

When conventional is express or tacit.

*Pignus testamentarium*⁶ is constituted by the testator expressly granting a right to the pledge under his hand; and it is, moreover, *tacitum* when the nature of the testamentary disposition renders such pledge presumable by implication, as by bequeathing the annual revenue of an estate to a person, whereby he will acquire a tacit testamentary pignoratitian claim upon the estate itself.

When testamentary.

The *pignus necessarium* is subdivided into *legale*,⁷ or that which the law necessarily implies, so that there is no necessity for bargaining for it expressly; neither will a bargain, to the contrary, be of avail, on which account it is said to be understood, and is therefore also called a tacit pledge;⁸ and into *prætorium*, otherwise termed *judiciale*, or that claim which the judge assigns upon the goods of another for his own security.

When necessary, otherwise legal or understood.

When prætorian or judicial.

¹ Hofacker, T. 2, § 1191.

² P. 20, 1, 15, § 1; P. 20, 4, 2; C. 8, 14, 2; but hereupon is much controversy, Müller ad Leyser, obs. 434-55; Weber, Beitr. z. Stillschw. Conv. P. R. n. 2 (vide et his attempts, 1 B. S. 177, seq.); Glück, l. c. 18, B. S. 235-51; Arch. f. C. P. 9 B. 3 Hft. nr. 19; Caplik, l. c. p. 73-76; Linde, Zeitsch. 1 B. 1 Hft. § 47-49, 2 Hft. S. 327-336; Schweppe, Röm. Priv. R. 2 B. S. 312-13; Gesterding, S. 329-337.

³ P. 2, 14, 17, § 2; P. 20, 1, 3. This latter, inasmuch as it grants a real right without delivery, is prætorian, and an exception.

⁴ Thib. P. R. § 108, 101, 786; Gesterding, S. 122-5; Meissner, l. c. § 2-14; Hert de Pign. conv. tac. (op. v. 2, T. 3.)

⁵ C. 4, 65, 5; Weber, l. c. n. 1 (vers. 1,

B. S. 79, seq.); Donell de Pign. c. 4; Bach. L. 1, l. c. 12, n. 4; Glück, 18, B. S. 305-6.

⁶ Mussel, l. c. spec. 1, 2, Heidl. 1810-11; Meissner, l. c. § 178-85; Glück, l. c. 18, B. S. 189-191, 19, B. S. 169, 76; Heppel, l. c. Lips. 1825, § 16.

⁷ This expression was invented by commentators to avoid a confusion, the proper Roman term being *tacitum*.

⁸ Præscription is by some held to confer this right, but how can this be? A debt must be supposed; this would be prescribed in ten amongst presentees, and in twenty amongst absentees, but it is pignoratitian right in thirty years, vide Thib. P. R. § 786 & 1018, which is ten years after the extinguishment of the debt; which is absurd, &c.

§ 1468.

Jus pignoris
generale et
legale sive
tacitum.

On account of
taxes.

Binds prede-
cessors.

On account of
the *dos*, *donatio*
propter nuptias,
and *para-*
phernalia ;

Date of the
accretion.

of the promissio
dotis ;

on the property
of the father ;

With reference to the general charge on property :—

Firstly, the *fiscus*, and he to whomsoever its rights have been farmed or ceded, possess a general charge or claim on account of taxes in arrear ; the *pignoratitium* right accrues from the moment in which such taxes are imposed.¹

Secondly, this right extends to the property of those who have contracted with such farmer of revenue or with his predecessor in office, although only from the date of the cession being made to such person.²

Thirdly, the legal³ and perhaps the putative wife⁴ or their successor possess it on account of her *dos*, any augmentation thereto, and the *donatio propter nuptias* ; but in respect of *paraphernalia*, only in as far as they consist in ready money.⁵ The claim is, however, only available to Christians of the orthodox confession ; hence a Jewess⁶ does not possess it. Neither does it accrue to a bride, *sponsa*,⁷ but only to a married woman, or to one who is putatively so ; and here, too, a distinction is to be drawn as to the period at which the right accrues. If the *dos* have been settled before marriage, the right commences with the solemnization ; but in cases of augmentation and *paraphernalia*, with the *illatio* : in the case of *donatio propter nuptias*, with the time at which it is settled.⁸

Fourthly, the husband has it on the property of such as promised the *dos*.⁹

Fifthly, it accrues to children on the property of their *father*, when he administers property which descends to them from their maternal ascendants,¹⁰ and on that of their own *proper father*, as far as regards property forfeited by his contracting a second marriage ;¹¹ likewise on account of a *dos*, or *donatio propter nuptias*, which may have come to him by dotal contracts.¹² Children,

¹ P. 49, 14, 28 ; Id. 47 ; Id. 45, § 9 ; P. 49, 15, 5, § 3 ; C. 7, 73, 2, 3, 6, 7 ; C. 8, 19, 2 ; C. 4, 46, 1 ; C. 10, 2, 1 ; Meissner is in some measure of a different opinion, § 109.

² C. 8, 15, 1, 2 ; P. 49, 14, 6 ; Schröter in Linde Zschft. 1 B. 2 Hft. p. 336-341 ; contra, Happel's right of the creditors in respect of hand pledge (German), Giess. 1802, p. 179-193 ; Hepp. l. c. § 5 ; Wenning, C. R. 1 vol. p. 314.

³ C. 5, 12, 50 ; C. 5, 13, 1, § 1 ; Nov. 97, 2.

⁴ Glück, l. c. seq. B. S. 107-111, 130-132.

⁵ C. 5, 14, 11 ; C. 5, 3, 19 ; C. 5, 12, 29 ; Nov. 109, 1 ; Emminghaus, de pig. leg. quod uxori propter bon. para. in bon. mariti competet, Jen. 1788 ; Meissner, § 163-8.

⁶ Nov. 109, 1 ; Puf. T. 1, obs. 208 ;

v. Tigerström, dotal. 2 vol. 394-400 ; Struben, 3 B. 68 Bed. ; contra, Koch, 9 Med. 1 B. n. 7 ; Dabelow, Concura. p. 245-9 ; Gesterding, Nachf. 19 vol. p. 111-120.

⁷ Hofacker, 2, § 1181 ; vid. et Dabelow, § 243-5 ; Hepp. l. c. § 35-40 ; Glück, l. c. 19, B. S. 93-106 ; cont. v. Tigerström, l. c. 356-369, 377-403.

⁸ Hepp. l. c. § 7.

⁹ C. 5, 13, 1, § 1 ; Meissner, § 140-8.

¹⁰ Hellfeld, de divers. pig. jur. lib. in par. bon. comp. (in opusc.) ; Müller ad Leyser, obs. 458 ; Meissner, § 123-139, such is the generally received opinion ; sed vide contra, Löhr, im Arch. f. C. P. 9 B. 1 Hft. nr. 4, 10 B. 3 Hft. nr. 17 ; Pfeiffer, pract. Auf. 1 B. nr. 5.

¹¹ Nov. 98 ; Marezoll in Linde Zschft. 3 B. 1 Hft. S. 84-91.

¹² C. 5, 9, 6, § 2, 3 ; Id. 8, § 4.

moreover, have a similar claim on the property of their *stepfather*, if the mother contract a second marriage without previously presenting the guardianship accounts,¹ because the property comes under his administration.

Sixthly, pupils, minors, madmen, and their heirs, have a pignoratitium claim on the property of their tutors and protutors, not being the magistrate, on account of claims arising out of their administration, which date from the moment of the transfer or voluntary assumption of the guardianship.²

of tutors and protutors ;

Seventhly, the Church has a tacit hypothek on the property of its emphyteuta, where he has dilapidated the property held by that tenure, dating from the period of waste committed.

The Church has the J. P. on the property of the emphyteuta ;

Eighthly, the tacit hypothek on the property of a widow entering a second time into wedlock, contrary to a testamentary prohibition, accrues in favor of those who, under such circumstances, have a claim to the subject-matter in her place.³

As regards secundæ nuptiæ.

§ 1469.

Thibaut, following the usual classification, adds a paragraph in his system of the law of the Pandects, intituled Miscellaneous ;⁴ but remarks that this hypothek is in its origin more strictly special. He places under that head the claims of legatees on the property⁵ which the heir, who is burthened with the payment of legacies, has received from the testator or on that of many, *pro rata*,⁶ should there be more than one ; it, therefore, makes no difference whether such person be or be not universal heir. This hypothek vests immediately after the *cessio diei*,⁷ and is effective even against third parties.⁸

The jus pignoris mixtum.

Fidei commissary heirs enjoy it in as large a sense as legatees ;⁹ the same applies in the *fidei commissum ejus quod supererit*¹⁰ when this confers a vested interest.¹¹

¹ C. 8, 15, 6.

² C. 5, 13, 1, § 1 ; C. 5, 30, 5 ; C. 5, 35, 2 ; C. 5, 37, 20 ; C. 5, 70, ult. 5, 6 ; C. 8, 15, 6 ; Nov. 22, 40 ; Nov. 118, 5 ; Müller ad Leyser, obs. 460 ; Glück, l. c. 19, B. S. 154-9 ; Brokes, de lac. pup. hyp. per mutuum non expir. Jen. 1750 ; Meissner, l. c. § 112, 122 ; Hepp. l. c. § 6 ; contra as regards protutors, Bingo an pupillis in bon. eor. qui pro tut. gesserunt hyp. tac. comp. Heidelb. 1816 ; as to German practice vid. Hofacker, T. 2, § 1183 ; Dabelow, l. c. § 217-8, 234-5, 627, n. 5 ; Müller, l. c. obs. 464 ; Hellfeld, J. F. § 1089 ; Biener, opusc. T. 2, nr. 73 ; Glück, l. c. 19, B. S. 196-8.

³ Nov. 7, 3, § 2 ; Hepp. l. c. § 8 ; Id. in Arch. f. C. P. 10 B. 2 Hft. S. 272-4 ; vid. Buri ed Runde, 2, B. S. 248, in Thib. P. R. § 789, n. 6 ; as to extension to all emphyteutical contracts, contra Meissner, § 198.

⁴ Thibaut's view is founded on Nov. 22,

44 ; Glück, l. c. S. 164 ; Vermehren, Arch. f. C. P. 13 B. 1 Hft. S. 37-42 ; vide dispute between Marezzoli in Löhr. Mag. 4 B. 2, 3 Hft. S. 221-3 ; et in Linde Zschft. 6 B. 2 Hft. nr. 8 ; et Kämmerer, id. nr. 7.

⁵ § 190, Weining, C. R. 1, B. S. 320-21.

⁶ C. 6, 43, 1 ; Meissner, § 182-3 ; contra, Glück, l. c. 19, B. S. 176-196 ; sed vide Arch. f. C. P. 5 B. 2 Hft. S. 213-21 ; Gesterding, Nachf. 3 B. S. 197-208.

⁷ Thib. l. c. 941 ; Meissner, § 185 ; Musset, de jur. pig. leg. spec. 2, Heidelb. 1811 ; Hepp. diss. cit. § 13.

⁸ Nov. 108, 2 ; Meissner, § 181 ; contra, Faber, error. pragmat. Dec. 48, Er. 9.

⁹ C. 6, 43, 1 ; Löhr. Magaz. 4 B. 2 St. S. 85-100 ; Archiv. l. c. p. 208, 212 ; contra, Gmelin, v. d. Rangord. J. St. 4, c. § 27 ; Meissner, § 178-181.

¹⁰ Thib. l. c. § 790 & 927.

¹¹ Nov. 108, 2.

Thibaut concludes by observing, that, when these have been mentioned, there are no other legal or tacit hypotheks.¹

The *jus pignoris speciale*.
As applicable to money laid out in building, or

Firstly, such as lend,² with knowledge of the architect,³ money for the re-erection of a building which has been destroyed,⁴ acquire a special legal lien on such superstructure, and upon the ground whereupon it has been constructed,⁵ from the day that the advance has been used for such purpose.⁶ Such as have bargained for, or otherwise⁷ possess, a pignoratitium right on a house or other object on account of what they have contributed to its restoration in money, labor, or material.⁸

for the purchase of a militia;

but for that of an immoveable, or of ships, by agreement only;

but in the case of a *prædium*, it accrues on the produce;

Secondly, whoso actively contributes something or advances money for the purchase of a *militia*,⁹ acquires a legal pignoratitium right on the employ;¹⁰ but he who advances part of the price of an immoveable purchase, or gives credit for that of a landed estate,¹¹ or the construction of a house, acquires a mere privileged pignoratitium claim on agreement having been made that he should have one;¹² and the same rule applies to ships.¹³

Thirdly, the law gives the landlord of a farm, *prædium rusticum* or *urbanum*,¹⁴ a charge in default of special agreement,—in the first case, a mortgage on the produce, dating from the moment of harvesting;¹⁵ and in the latter case, on the furniture, &c. of the tenant destined for his constant use,¹⁶ dating from the moment of

¹ Harprecht, *trutina* xx. pig. sac. vel indubie spuriorum vel summe dubiorum, Tüb. 1705; Lauterbach, coll. L. 20, T. 2, § 126; vide et Meissner, § 189-202.

² P. 20, 2, 1; Puf. 2, obs. 170; G. L. Boehmer, de merc. et de opific. in conc. cred. (elect. T. 1, n. 12) § 11, 12; Walch, de pac. in refect. æd. cred. (opusc. V. 3) § 6; Meissner, l. c. § 77; Thib. P. R. § 788, ibiq. cit.; Glück, l. c. 19, B. S. 1-46; Schweppe, Mag. 1 B. 1 St. nr. vi.

³ Frister, de priv. cred. person. Goett. 1804, c. 2, § 8; Meissner, l. c. § 79-80; contra, Walch, 2, § 7.

⁴ Schulting, Th. contr. Dec. 76, n. 7; Meissner, § 78.

⁵ Nov. 97, 3; Walch, 2, § 4; Frister, l. c.; Hepp. ad § 786, n. m, cit. § 10, im Archiv. J. C. P. 10 B. 2 Hft. S. 274-6.

⁶ P. 20, 4, 5, & 6; vide Thib. l. c. § 788, ibique citt. de priv. exig. Cuj. ad L. 7, qui pot. in pig.; Carpov, P. 1, c. 28, Def. 105; Lauterbach, de priv. cred. pers. simpl. § 27, 28; Erxleben, de jur. p. § 83 & 235; Dabelow, on Conc. 2 ed. p. 225-9; Meissner, § 84; Schweppe, Mag. 1, St. nr. 6; Newshatel et Zimmern Unters. vol. 1, p. 283-93; Tulleken, de pig. et hyp. tac. Lugd. Bot. p. 28-42.

⁷ P. 20, 4, 5, 6; Beust. de jur. prælati non cred. f. 1, c. 29.

⁸ Under this head belong legally saleable and inheritable court offices (charges de la

court), the right of practising in the late palace court, or a commission in the army or gentlemen pensioners, corresponds in the present day to the Roman or Byzantine militia.

⁹ C. 8, 14, ult.; Nov. 53, 5; Nov. 97, 4; Koch, de per. ad emend. cred. giess. 1780, § 14; contra inter alios multos, Dabelow, l. c. p. 249-51; Hofacker, T. 2, § 1213.

¹⁰ Gmelin, v. d. Rangordn. d. cl. 3, cap. § 4, n. a.

¹¹ P. 14, 4, 5, § 17; P. 50, 16, 66; C. 8, 14, 17; C. 8, 18, 7; Nov. 97, 3; Koch, l. c. § 13; Gmelin, l. c. 3, § 4, 5, 6; Frister, l. c. 2, § 10.

¹² Nov. 97, 3; Gmelin, l. c.

¹³ Bachov. L. 1, l. c. 12, n. 12; Glück, P. 18 vol. p. 403-448.

¹⁴ The former term is applied to farms for the cultivation of produce; the latter, to a dwelling-house; P. 20, 2, 3 & 4; Weber, vers. 1, v. ii. n. 1, § 1; Meissner, l. c. § 71-3.

¹⁵ P. 20, 2, 7, pr.; P. 19, 2, 24, § 1 & 53; C. 4, 65, 5; Weber, § 2, sq.; Meissner, § 71-3.

¹⁶ P. 20, 1, 32, in fin.; P. 20, 2, 7, § 1, this does not extend to obligations; Negri-zantius, P. 2, m. 4, n. 152, and in the case of open stores, only on the entirety; P. 20, 1, 34, pr. 20, 4, 21, § 1; Puf. T. 2, obs. 29; Meissner, § 63.

its illation,¹ in respect of claims arising out of the contract.² Now, if the lessee underlet, the produce clearly remains mortgaged to the first hirer; but to the first lessee or landlord, the furniture and things brought in *illata* by the under-tenant, to the amount of such sub-rent only.³ Further, an under-tenant possesses a similar claim against an under-tenant,⁴ but not an under-lessor against an under-lessor;⁵ but this right of mortgage cannot be extended to other persons.⁶

and in cases of under lease;

Fourthly, pupils and minors possess a legal or tacit mortgage⁷ on all things really bought with their money, and in cases where the tutor or curator was himself the purchaser, even the *actio dominii*.⁸

of the property of pupils and minors;

Fifthly, ground landlords to whom ground rent is due;⁹ and

of ground landlords;
of contractors with the fiscus.

Sixthly, the fiscus in respect of property acquired by those who have had dealings with that department after contract made. Thibaut denies the right of the two last; sed quære?¹⁰

§ 1470.

The *missio in bona*,¹¹ by the prætor, confers a *jus pignoris prætorium*. This occurs under various circumstances, the principal of which are as follow:—

The *jus pignoris prætorium*.

It granted *contumaciæ coërcendæ causa*, that is to say, when the adverse party in a suit contumaciously fails to appear, or is absent.¹² This has some similarity to the *distringas* to compel appearance issued in England, when the defendant cannot be found.

Contumaciæ coërcendæ causa.

In cases where the defendant declined to give the plaintiff *cautio de damno infecto ex primo decreto*.

Pro cautione de damno infecto.

When a plaintiff is disabled from some cause from bringing his action within the proper time, and by the delay is exposed to the risk of losing his claims; thus, for instance, when a legacy is left *sub conditione* or *in diem*, termed *immissio legatorum servandorum causa*,¹³ and there is a probability of the heir who refuses, or is unable to give security, dissipating it before the period of payment

Legatorum servandorum causa.

¹ P. 20, 2, 2, 3, 4, 5, pr. 6, 7, § 1, 9; P. 11, 7, 14, § 1; P. 13, 7, 11, § 5; C. 8, 15, 7; C. 4, 65, 5; Voirhage, de tac. pig. loc. Arg. 1757; Hepp. l. c. § 11.

² P. 20, 2, 2; Struben, 3 B. 12 Bed.; Meissner, § 62.

³ P. 19, 2, 24, § 1; P. 13, 7, 11, § 5; Voet. 20, 2, § 7; Puf. T. 2, obs. 28; contra, Perez. in c. 8, 15, n. 3; Erxleben, § 90.

⁴ Vid. supra, n. 3.

⁵ P. 19, 2, 24, § 1; id. 53; P. 20, 2, 7, pr.; Meissner, l. c.

⁶ Meissner, t. § 74, 6; contra, Giesler, de hyp. tac. dom. ex causa cun. emptyt. Erl. 1778.

⁷ P. 20, 4, 7; P. 27, 9, 3; P. 26, 9, 2; C. 7, 8, 6; Meissner, § 85-91; Glück, l. c. 19 B. S. 47-58.

⁸ Thib. P. R. § 707.

⁹ Westphal. § 101; Müllner ad Leyser, obs. 448; Gottschalk, disc. for. nr. 16; Glück, l. c. 19 B. 58-61.

¹⁰ Thib. l. c. § 788, 803.

¹¹ P. 13, 7, 26, non est mirum si ex quacunque causa magistratus in possessionem aliquem miserit pignus constitui, C. 8, 23, 1; Küstner, de ritu pig. cap. ap. vel. Rom. diss. 1, 2, Lips. 1741-2; Alep. de pig. præ. Hiedel. 1739; Schröder, op. de nat. et eff. pig. præ. et jud. Marb. 1751; Happel, die Rechte d. Gläub. in Aussch. der Faust. pf. Geiss. 1803, S. 31-53, 62-74; Höpf. in Hein. § 824; Thib. l. c. § 734, 787.

¹² I. 1, 24, § 3.

¹³ C. 6, 54, 3, 5, 6.

can arrive; or if the debtor is a prisoner of war in a foreign country, and therefore out of the jurisdiction of the court.

Ventris nomine
datum.
Judicati exe-
quendi causa.

In the case of a widow who obtains *B. P. ventris nomine*.¹

When a judgment in a personal action has been obtained against a defendant, who either cannot or will not conform to the sentence; under such circumstances, he is deprived of so much of his goods as will represent the claim, these remain in the plaintiff's possession, and may be sold by him after the expiry of two months by public auction, and the surplus, if any, be paid back to him; this is termed the *jus pignoris prætorium judicati exequendi causa*, or *pignus judiciale*, to distinguish it from the *pignus prætorium strictè dictum*.²

No priority in
this pignora.

When many *immissiones prætorie* concur, no priority is allowed³ to one over the other.

§ 1471.

Pignora privi-
legiata.

A right of pledge may be privileged, in that it has a priority over other public and elder claims of like nature,—in which case, it is termed *pignus privilegiatum, qualificatum, or cum jure prælationis conjunctum*. If no such right of priority exist, it is termed *simplex*.

Pignus simplex.

The *pignus simplex* having, by its very nature, no inherent priority, it follows that it must acquire such by some external circumstance, such as public authority or seniority; but the privileged *pignus* possesses this priority intrinsically over those which are older in date, or possess the sanction of public authority.

If the produce of the pledge be sufficient, ordinary creditors, termed private, come in according to the order of their seniority (the *pignus prætorium* having, as has been already observed, no priority by reason of its seniority);⁴ nor is this priority confined to legal hypothecations only, it equally applies to certain conventional ones.

Priority of the
fiscus :—

Firstly, the *fiscus* has a priority of claim on the property of the subject, on account of taxes in arrear.⁵

On the militia;

Secondly, the creditor of a sum lent for the purchase of an hereditary government office legally saleable, and termed a *militia*, provided he bargain for his priority at the time of the loan.⁶

on the property
of the *primipilus*;

Thirdly, the military chest has a priority of claim on the property of the *primipilus* or *primipilaris cohortis*, the paymaster-general or chief of the commissariat department, on account of

¹ Höpf. in Hein. § 656; P. 37, 9, 7, pr

² The term *pignus judiciale* does not occur in juridical Roman authors; it is termed *pignus quod in causa judicati capitur*.

³ Höpfner in Hein. § 716, 718, L. C.; Schroeder, de natura et effect. pign. prætor. atque judiciales, Marb. 1751, § 165, seq.; Erleben, tr. cit. p. 74, seq.; attachment

will not constitute a *pignus prætorium*,—Strube Rechtl. Bed. 3te, Abh. p. 77.

⁴ C. 8, 18, 3; P. 42, 5, 12.

⁵ C. 4, 46, 4; Walch, controuv. p. 797, ed. 3.

⁶ Eisenhardt, de jur. ejus qui ad milit. emend. credit in concursu creditorum opusc. num. 10, Höpfner in Hein. § 719.

the provisions not being properly distributed; on which account, the fiscus has been obliged to become responsible, further upon the property of the contractors gained by the contract.¹

Fourthly, the hypothecarius, for money advanced for the rebuilding or repair of a building. on buildings;

Fifthly, the hypothecarius who, with an express stipulation for priority, has lent money for the purchase of an immoveable or of a ship.² on immoveables and ships;

Sixthly, the hypothecarius of a thing sold, with the express reservation of a prior claim upon it, until payment of the price of it. on express reservation of priority;

Seventhly, pupils, in respect of things bought with their money.³ on things purchased with pupils' money;

Eighthly, the wife, in respect of the *dos*; and her children, only when the stepmother or second wife of their own father⁴ demands back her *dos*.⁵ on the property of a second husband; on necessary hypothecations.

Ninthly, according to Thibaut's opinion, all the persons mentioned in a former part of this work.⁶

These privileged creditors precede the simple ones; and when they come into collision with each other, their priority is to be settled by seniority of date, when neither have any especial privilege of priority.

Upon this question, there is much difference of opinion. Thibaut⁷ gives the sequence as follows:—He places the fiscus⁸ first; next, those who lent money, as above, for the purchase of a *militia*; who, if he has, however, not reserved his priority, cedes to the wife on account of her *dos*;⁹ otherwise, she comes into the third place, together with those who have lent money for the purchase of a ship, or repair of a building, thing, &c.¹⁰

Thibaut's view of the order of priority of privileged pledges.

As to other privileged hypothecators,—if none can assert some particular privilege, the priority is ruled by the principles of the common law on such matters.

Others follow the rules of the general law.

§ 1472.

The *jus pignoris* may be either *publicum* or *quasi publicum*, according as it is constituted in court, or before three unimpeachable male witnesses at least. A public charge must be effected in court by the pawnor or hypothecator himself in person, or by some one specially empowered by him in that behalf,¹¹ together with the

A pignus may be publicum or quasi publicum.

Coram judice.

¹ Thibaut, l. c. § 803, says that the wife of the *primipilus*, not being a paymaster or commissary, is preceded by the fiscus as a co-debtor of such *primipilus*. As to the contractors, he denies the privilege, but says that the fiscus has a claim in virtue of a sort of prior date. *Quære* distinction?

² § 1480, h. op.

³ P. 20, 4, 7, pr.; § 1480, h. op.

⁴ Thib. l. c. § 803; contra, Meissner, § 171.

⁵ Nov. 91, 1; C. 8, 18, 12, § 1; vid. Thib. l. c. n. d. *ibique* cit.

⁶ § 1480, h. op.

⁷ l. c. § 804, remarks that the theories

vary, citing Bachov. 4, 14; Erleben, § 230; Hofacker, T. 2, § 1213; Höpfner, com. § 715; Dabelow, p. 301-5, 620-1; Meissner, § 174-5; Bucholz, qui poterit in pig. Regemont. 1829; v. Tigerström, Dotl. 2 B. p. 369-393.

⁸ Thib. § 801.

⁹ Nov. 97, 4.

¹⁰ C. 8, 18, 12; Nov. 97, 3, 4.

¹¹ This is not so in Germany, where the *judex rei sitæ* only has this power, Erleben, tract. cit. p. 46; see vide in extenso, Boley's doctrine of public sub-pledges, according to Roman, German, and Württemberg law (German); Tüb. 1802.

express declaration of the grant of the charge; but, inasmuch as none can thus create or improve a charge on the property of another without the express consent of the pawnor or hypothecator, a confirmation of a charge said to exist, obtained from the court by the creditor *ex parte*, will be of none effect as a *jus pignoris publicum*; ¹ nay, further, a private charge does not become a public one even by the subsequent admission of the debtor himself.² But if the debtor, or debtor and creditor appear, and having agreed to receive the confirmation, such hypothek is converted into a public one.³

Coram testibus.

In order to convert a *pignus publicum*, constituted before witnesses, into one absolutely *publicum*, it is requisite that these be males, that their character be unimpeachable, that they be three in number, and that they subscribe the usual instrument.⁴

Leo's constitution giving public hypotheka priority.

A well-known constitution of Leo,⁵ of 469, gives public charges of this nature a priority over private ones; it runs as follows:—*Scripturas quæ sæpe adsolent a quibusdam secrete fieri intervenientibus amicis necne, transigendi, vel pasciscendi, seu fœnerandi, vel societatis cœundæ gratia, seu de aliis quibusdam causis, vel contractibus conficiuntur (quæ idioχελρα græce adpellantur) sive tota serjes earum manu contrahentium, vel notarii, vel alterius cujuslibet scripta fuerit, ipsorum tamen habeant subscriptiones sive testibus adhibitis sive non: licet conditionales sint (quos vulgo tabularios adpellant.) sive non, quasi publice conscriptas, si personalis actio exerceatur, suum robur habere (decernimus). Sis autem jus pignoris vel hypothecæ ex hujusmodi instrumentis vindicare quis sibi contenderit, eum qui instrumenta publice confectis nititur, præponi (decernimus) etiamsi posterior is contineatur; nisi forte probatæ atque integræ opinionis trium, vel amplius virorum subscriptiones eisdem idiochiris instrumentis contineantur, tunc enim quasi publice confecta accipiuntur.*

Its history and origin.

The history of this constitution is, that before the reign of Leo all hypotheks had execution according to their respective dates, whether conventional, testamentary, legal, or prætorian, the privileged alone excepted. The fact of priority was a question of evidence to be proved by witnesses or documents; but a simple private instrument was of none effect as against a third party, because a fraudulent hypothecator had it in his power to make collusively some other hypothek deed dated before the first, which is not so easily effected in the case of a document made before a public authority or before three witnesses, both having in some

¹ Puf. 2, obs. 160.

² Puf. 1, obs. 197; Schweder, diss. infra cit. § 12, p. 334.

³ Puf. 4, obs. 176; sed vide Schweder, diss. de auct. publ. ad pig. const. necessaria, § 5, in collect. diss. vol. 2; Gmelin von der Ordnung der Gläubiger, c. 4, § 12; I. F. Wahl, diss. de val. et effect. reser-

vationis dominii vel hypothecæ in secur. resid. pret. Goett. 1753, sect. 1, § 14, who maintain unconditionally the reverse.

⁴ Mevius, pt. 7, dec. 235; Schweder, l. c. § 23, p. 356; Müller ad Leyser, obs. 797, as to notarial instruments, vide Schweder, l. c. p. 355.

⁵ C. 8, 18, 11.

measure the advantage of publicity, in addition to a perfect proof of the date at which the instrument was made.

Höpfner¹ attaches great importance to the fact of publicity, because the simple formality ought not to give priority when another has really lent money upon such security; nevertheless, this appears upon all fours with wills, if the mortgagee do not conform to the law made for his protection, he is punished by loss of his priority.

Höpfner's
opinion.

§ 1473.

The *pactum antichreticum*² is peculiar in this, that it by its nature assigns the produce as the word implies,³ by way of interest to the pledgee,⁴ termed in English law a Welsh mortgage.

The pignus of
the pactum an-
tichreticum.

The *pactum antichreseos* is taken to imply, in all cases of doubt, a pignoratitium contract;⁵ which, therefore, by its very essence, transfers all burdens from the usufructuary to the creditor,⁶ and in so far partakes of its incidents.

This contract must not, however, be made a means of obtaining usurious interest, whether its proceeds consist in civil or in such natural products as are calculated on an average of years.

It is, nevertheless, a rule that the creditor is not chargeable with the value of such fruits as he may neglect to gather.⁷

Creditor anti-
chreticus not
answerable for
neglected fruits.
Antichresis
tacita.

An *antichresis tacita* accrues to a creditor who has lent his debtor a capital sum without interest, and permits him, by implication, to retain so much produce as will represent the legal interest, although no antichretic contract have expressly intervened;⁸ he must, moreover, return the object to the debtor on the extinguishment of his claim, and, if he should sell the pledge, hand over the surplus which may remain over and above the amount of such claim.⁹

§ 1474.

The *jus pignoris* must be regarded in four points of view,— firstly, as concerns the relation of the debtor to the creditor; secondly, of the creditor to the debtor; thirdly, as regards the

The four points
of view in which
the *jus pignoris*
may be regarded.

¹ Ad Hein. § 716, n. 5; citing I. H. Boehmer, diss. de prærogat. hypoth. publ. c. 1, § 13; in Exercit. ad Pand. T. 3; Westphal. vom Pfandrecht, § 167; Sator, diss. de pig. prærog. § 13; Hofacker, diss. de prærogativa pig. publ. Tüb. 1780; Hellfeld, de prærog. hypoth. publ. tac. æque ac expresse competente in opusc.; J. C. Soeldner, de hypoth. tac. judici alibus, s. registratis haud præponendis, Helmstad, 1785; Bolley, l. c. § 6, 119, etc.

² ἀντι-χρησῖς in consideration of use, Cocceii, de antich. (Exerc. V. 1, n. 29); Lauterbach, de jur. antich. Tüb. 1654.

³ P. 13, 7, 33; P. 20, 1, 11, § 1; Westphal. § 66; Puf. 2, obs. 169; Thib. l. c. § 799, n. 9, ibique cit.

⁴ C. 4, 32, 14 & 17; Puf. 2, obs. 76 &

3, obs. 57; S. L. Boehmer, Rechts, 1 B. n. 71; Diverse Emminghaus ad Cocc. 13, 5, 5; Erxleben, § 112; Happel, die Rechte, d. Gl. in Aus. d. Faustpf. S. 229-283; Schneidt. de usur. antich. etc. Wiscb. 1784, § 57-75; Seuffert Erört. einz. lehr. 2, Abth. S. 104-6; Coote on Mortg. ch. 2, p. 8.

⁵ P. 13, 7, 33; P. 20, 1, 11, § 1; Cuj. obs. 3, 35; Glück, l. c. 14, B. S. 104-118.

⁶ Leyser, Sp. 157, m. 7-9.

⁷ Engelbrecht, de cred. antich. ad fruct. percip. non oblig. Lips. 1724.

⁸ Thib. l. c. § 9, 799; P. 20, 2, 8; Noodt, de fœn. et usur. 2, 9; contra, Vinnius, Q. S. 2, 7; Happel, l. c. p. 230-41; Glück, com. 14 B. p. 50-7.

⁹ P. 13, 7, 24, § 1.

rights of several hypothecarii respectively among themselves; and fourthly, as to those of hypothecarii, as against third persons. The first may be treated in conjunction with the second, since the rights and obligations of the creditor naturally include those of the debtor; and for like reason, the fourth also.

Of debtor and creditor.

The creditor's charge extends over the entire object *impignorat* until it be wholly discharged,¹ for which purpose he may proceed to sale. In the case of the pledge, properly so-called, the civil and natural possession, together with all the rights incidental thereto, is at once transferred to the creditor;² hence, should he suffer eviction and be ousted of his possession through some inherent defect in the contract, by which a pledge has been granted him, he can enforce the grant of a corresponding and fresh charge,³ together with indemnity for damage accruing to him by the fault of the debtor or otherwise;⁴ neither is he even affected by the *casus fortuitus* or mere accident, inasmuch as the object remains the property of the debtor,⁵—for which reason he has also a lien for necessary expenses laid out upon the object, and even, as has been seen, for beneficial improvements, if moderate.⁶ Moreover, he can subpledge or under-pledge his *right*, but not the object, himself;⁷ and can exercise his right of retention⁸ for a claim for which account the object has not been pledged to him; an anomaly apparently irreconcilable with sound legal logic, the reconciliation of which has, nevertheless, been attempted by some authors.⁹

§ 1475.

Priority of colliding pawnees.
Sequence of claims.
Privileged creditors.

We now come to the rights of the pledgee,—when the pledge is sold, and there are various claims upon the fund produced by the sale, the leading distinctions on this head are the following:¹⁰—

In the first place, those creditors who possess privileged debts enjoy a right of priority of payment in virtue of a tacit prior pledge; and here it must be remarked, that, as pledging constitutes a claim only without passing the property in the object away from the original owner, the express pawnee or holder of the pledge has, in fact, no lien at all in virtue of his possession: thus the *fiscus* possesses a tacit prior claim on the property of all subjects on account of taxes due; when, then, the pawnee who holds plate in pawn proceeds to distrain, he discovers that the pawnor is indebted to the *fiscus*, which, in virtue of its prior and

¹ P. 21, 2, 65; C. 2, 19, 3.

² Thib. P. R. § 208.

³ P. 23, 7, 29, pr.; Id. 31, 32.

⁴ P. 13, 7, 9, pr.; Id. 31, 32, & 36, pr.

⁵ C. 8, 14, 5, 6, & 9; P. 13, 7, 43, § 1.

⁶ P. 13, 7, 8, pr. & 25; C. 8, 14, 6; Leyser, spec. 156; Rivinus, de deb. delicato in cont. ad. indicio, Veleb. 1743.

⁷ C. 8, 24, 1, 2; Gmelin, l. c. § 63; Westphal, § 142-4; as to P. 13, 7, 40, §

2, comp. P. 20, 1, 13, § 2, and Hepp. im Arch. f. c.; P. 13, B. 3 Hft. nr. 18, and id. in d. A. L. Z. 1832, S. 493, 494, et Arch. f. c.; P. 15 B. 1 Hft. nr. 4.

⁸ P. 23, 7, 8, § 5; C. 4, 32, 22; C. 8, 27, 1.

⁹ Hepp. l. c. 1832, S. 504; C. 4, 32, 4; de quo vide Gesterding, S. 59-62.

¹⁰ Story, Bail, § 312; Domat. B. 3, t. 1, § 5, per tot. Pothier de Nant. n. 26; Pand. lib. 20, t. 4, per tot.

privileged claim, steps in and pays itself first out of the proceeds; and if there be any other creditors who are on all fours with the fiscus, they will take together with it; but otherwise in their order of rotation, yet always before the holder, *pari passu*, according to their rank and degree.

Secondly, those pignoratitium creditors who have, as such, a specific title to the thing, take according to the priority of their respective titles in *point of time*, except, indeed, some peculiar circumstances intervene to vary the rule of *qui prior est tempore, potior est jure*;¹ thus, when equally privileged or simple gagees² collide, it is a common rule of law, that he who has the best proof of his title shall precede those whose claim is less perfect; hence *pignora publica* and *quasi publica* will have the preference over those who can adduce no such legal proof.

Equally co-privileged specific creditors follow each in order of time.

A private pledge may be converted into a public one; the consent or *ratihabitio* of the pledger is, however, in all cases presumed.³

The public credit does not, however, go the length of placing a privileged gage before the private one of one not so privileged; nor of placing an especially privileged one before one not so especially privileged; nor a simple before a privileged one.⁴ But the rule is valid not in the competition of simple pledges only, but also in that of those equally privileged as respects each other; notwithstanding which, this does not extend, so far as regards other creditors,⁵ to a testamentary pledge constituted before a public authority, or before three witness at least.

Thirdly, if the pledge be for the joint benefit of several creditors, or *in solidum*, each of them is entitled to share equally with the other, *pro rata debitorum*, so long as the one be not in exclusive possession of the object;⁶ and that is considered the elder, which is granted as a security for a claim coming due before another.⁷

Joint creditors take together.

Fourthly, if the object has been pledged severally to two creditors without any communication with each other, one of whom has obtained the possession, he is entitled to the preference according to possession; following the maxim,—*In pari causâ possessor potior haberi debet*;⁸ and *in æquali jure melior est conditio possidentis*.

Creditors in severalty according to possession.

Fifthly, it is a common law rule, that the object is distributable in proportion to the greater amount of the claim,⁹ under the proviso applicable to all sorts of gages, that if a private novation have taken place, whereby a new obligation is substituted in

and according to amount of claim in cases of novation.

¹ Poth. Pand. 20, 4, § 1.

² Thib. P. P. § 805, *ibique cit.*; et vide C. 2, 18, 12, & 12; Nov. 97, 3, 4, et § 1472, h. op.

³ Puf. 1 obs. 197; Id. 2 obs. 160.

⁴ Thib. L. c. § 805, n. s.

⁵ Bolley, § 121.

⁶ P. 20, 1, 10; P. 43, 32, 1, § 2.

⁷ P. 20, 4, 13.

⁸ P. 50, 17, 128.

⁹ P. 20, 4, 2, 11, pr. 12, § 2, 16; C. 2, 18, 8; v. Bülow, Abb. Bruna. 1817, p. 138-54; Hepp. ex quo temp. hypoth. bona debitorum officiat. Lips. 1825.

the place of the original one upon the old security, the creation of such pledge or right shall be held to date from the first, and not from the new grant of the claim, according to the extent which it originally possessed.¹ Prætorian pledges, it has been seen,² are excepted, and go contemporaneously with each other, irrespective of the date of *immissio in bona* granted.

Testamentary
mortgagees.

Sixthly, legatees in that capacity have a prior claim on a testamentary or legal gage in respect of all such as were so created before the death of the testator or deceased. But as they regard each other and later creditors, they take their place according to the common rules.³

Summary of
sequence.

Such are the general leading rules to be observed in the distribution of a fund produced on the sale of a pledge, and may be summed up most readily according to the order to be found noted in the margin :—

Firstly, privileged creditors.

Secondly, equally specific co-privileged claimants in order of time.

Thirdly, creditors severally according to possession.

Fifthly, claimants according to amount.

Sixthly, testamentary claimants.

Rights of the
priority creditor.

Thus the creditor who possesses a superior right or privilege will be entitled to maintain it; and to receive compensation in full out of the fund, before the creditor who holds under a mere contract of pledge from the debtor; and in the next place, if the thing is pledged or sold to one and the same creditors for several debts, and the pledge when sold be insufficient to satisfy them all, the proceeds of the sale are applicable, proportionately, to extinguish all the debts, *pro tanto*.⁴

Thibaut⁵ terms these priority creditors, or creditors of creditors, *separatists*; his excellent and exact remarks are deeply logical, and conceived in very concise and difficult language, but are of the above substance.

What constitutes an older
pledge.

A right of gage is older which has been granted at a prior period to another; thus, if such right be conditionally or unconditionally granted for a certain debt, the creation of the claim dates from the day the condition came into existence, save the condition be such as was generally capable of being withdrawn.⁶

¹ P. 20, 4, 3, pr. 12, § 5.

² § 1470, h. op.; P. 36, 4, 5, § 3; P. 30, 2, 15, § 15; P. 42, 5, 12; Voet. 20, 4, § 28; Happel v. Recht der Glaubiger in Aris. der Faust Pfänder, p. 44, seq.

³ C. 6, 50, ult. § 5; Meissner, § 186-88; Bolley, § 121.

⁴ 1 Domat. B. 3, 1, § 5, per tot.; Id. 3, 1, § 1, art. 13, 14; Id. § 3; Hein. P. P. 4, 20, 4, § 31-36; Ayliffe, P. B. 4, t. 18, p. 529; Poth. P. 2 & 4, per tot.

⁵ Thib. über Pfand. separatisten in den

Civil. Abhandl. N. 13; et Id. P. R. § 80, et seq.; A. G. W. Weber, de pec. hæred. acced. observationes de dom. et hypoth. reservatione, Goett. 1816, c. 2, § 7.

⁶ Thib. l. c. § 126, § 806; P. 20, 4, 9, § 1, 2; Id. 11, § 2; Gesterding, p. 82-88, 248-61; Glück, P. 18, B. S. 214-19, 19, B. S. 233-246; Arch. f. C. P. 4 B. 1 Hft. nr. vii. 3 Hft. nr. xxviii.; Bolley, l. c. § 110-13; contra, Hepp. l. c. § 21; et Id. in d. A. L. Z. 1832, S. 494-5, 512-24.

§ 1476.

Having seen the rights of pignoratitium creditors as against each other, it now remains to review their rights over against common personal creditors, in cases of bankruptcy or of insolvency. These are, by the later Roman law, ranged in five classes, of which the preceding one always excludes that next succeeding.

In the first class are—

1. Funeral expenses.
2. Hand-to-mouth men.
3. The fiscus for arrears.

In the second and third classes—

Privileged and simple hypothecars (hypothecarii).

In the fourth—

1. The state.
2. The prince.
3. Holders of bottomry bonds.
4. Loans for restoration of buildings.
5. The wife and bride.
6. Claims against guardians.
7. Payers of other creditors in this class.
8. Gratuitous loans of money.

The fifth class—

1. Residuaries.
2. Exchequer penalties.
3. Non-applicants.

The rights of pledge creditors in collision with ordinary creditors. Are arranged in five classes. The first.

The second and third.

The fourth.

The fifth.

§ 1477.

The first class, then, contains eight descriptions of claims.

Firstly, funeral expenses: this term includes all costs for decently and respectably¹ burying the common debtor,² or person whom he himself is under the obligation of burying.³ But the expense must, in both cases, be made before the formal fiat of bankruptcy; and in the latter, before the death of the common debtor.⁴

Secondly, persons whose whole existence, in board and wages, depends upon their service in the employ of the common debtor;⁵ and in whatever they have to claim for their service by contract made before the formal fiat.⁶

The first class.

1. Funeral expenses.

2. Hand-to-mouth men.

¹ C. 11, 7, 14, § 3, 4, 5; Gmelin, Rangordn. d. Glaub. c. 2, § 4.

² C. 11, 7, 37, § 1.

³ P. 42, 5, 17, pr.

⁴ Mevius, P. 2, Dec. 222; Gmelin, l. c.; sed vide Dabelow v. Concurr. p. 186-7; some reckon in all expenses incurred in the last illness, sed contra, vid. Th. l. c. § 808; the error is founded on C. 11, 7, 37; Cocceii, eod. qu. 5; Voet. eod. § 15; Dabelow, l. c. p. 597-601.

⁵ Gmelin, l. c. 2, § 6; v. Zaugen, Prach. Rechtsroerter. Wetz. 1784, nr. 4.

⁶ Dabelow, p. 604-5. It is erroneous to include under this head either fees to advocates, E. L. Kortholt, de jur. salar. advoc. in concurr. cred. Gress. 1770, § 16, or mechanics' wages, G. L. Boehmer, de jur. merced. opificum in conc. cred. § 15 (Elect. T. 1, n. 12).

3. The *fiscus*
for arrears.

Thirdly, the *fiscus* comes in for taxes in arrear¹ and real dues which have become payable *after* the *concursum* precede all other creditors.²

In this class, then, funeral expenses take the first place;³ but the rest follow the rule applicable to purely personal creditors, and share alike, *pro rata*, without reference to the seniority of their claims.⁴

§ 1478.

The second
class.

The second class comprises those privileged or legal creditors on pledge and those who have stipulated for it, but who are not authorized to take their place in the *concursum* as creditor's creditors.

1. The *fiscus*.
2. The wife.
3. Pupils and minors.
4. Mortgagees of buildings.
5. Loans for a militia.
6. Farmers.

Firstly, the *fiscus* on the property of the subject.⁵

Secondly, the wife for her dower.

Thirdly, the pupil and minor on the thing bought with his money.

Fourthly, those who have lent money to restore a ruined building.⁶

Fifthly, those who lent money to purchase a *militia*.

Sixthly, the farmer of a *prædii rustici*, and the hirer of a *prædii urbani*.

§ 1479.

The third class.

The third class includes equally privileged or simple pawns.

1. Public pawnees.
2. Private pawnees.

Firstly, public pawns.

Secondly, private pawns according to order of seniority.

§ 1480.

The fourth
class.

The fourth class comprises personal simply privileged creditors.

1. The state.
2. The prince.

Firstly, the state and municipalities.⁷

Secondly, the sovereign prince or princess of the country; and the *fiscus*, as to all claims not placed in the first three or in the fifth class.⁸

3. Claimants on buildings and ships.

Thirdly, every one who, not claiming as a hypothecarius,⁹ has lent any sum for the purchase, building, or fitting out a ship, or has

¹ Dabelow, l. c. p. 606; but *pecunia hæreditaria* does not belong here as is asserted by Walch, de *privil. pec. hæred.* (opuscul. T. 3); Ag. I. Weber, de *pec. hæred.* Goett. 1816; Puf. 1, obs. 103, § 1; Biener, opusc. T. 2, Nr. 55-6; Dabelow, p. 609-14; sed vid. Thib. l. c. § 808.

² Not real dues which have fallen in before the *concursum*; Hofacker, 3, § 4617; contra propter, P. 13, 7, 17; et P. 2, 4, 15, is Dabelow, p. 608; sed vid. Cuj. ad L. 7, qui pot. in pig. who refers both laws; Thibaut, l. c. thinks rightly, to privileged legal hypothecations, and to cases where an advance has been made for the preservation of a thing, § 788, nr. 2; vide Thib. § 788, § 801; et vid. § 1468, h. op.

³ C. 11, 7, 14, § 1; Id. 26 & 25; C. 6, 30, 9; Voet. 11, 7, § 9; contra, Leyser, Sp. 484, m. 1, 2; Frister, de *priv. cred. personal.* Goett. 1804, c. 1, § 2, 3.

⁴ P. 42, 5, 5, 2; Gmelin, c. 2, § 16; contra, Dabelow, p. 614-15.

⁵ For a further development of these, vide § 1468, h. op.

⁶ § 1468, h. op.

⁷ P. 42, 5, 28, § 1; P. 50, 1, 21, pr. & 25; Frister, l. c. 2, § 14; Dabelow places churches in the same category with the above, p. 638-9.

⁸ P. 42, 5, 34; P. 49, 14, 6, § 1.

⁹ § 1471, h. op.; Thib. l. c. § 788, nr. I. II. III.

sold one on credit.¹ Nevertheless, whoso have lent money for the purchase of any other object, though it be immoveable, does not possess this privilege.²

Fourthly, those who have made advances in ready cash³ for the restoration,⁴ but not for the upholding or repair of a house or other thing.⁵ Strictly, the loan must be made with the knowledge of the architect,⁶ although the actual application of the loan do not belong to him,⁷ it being an entirely personal privilege.

Fifthly, the wife and bride, but not their heirs, on account of dotal claims.⁸ This is useless to the wife,⁹ though not to the bride, on account of the new right of general hypothek which the former possesses.¹⁰

Seventhly, all having claims against guardians,¹¹ except against *curatela reales*; ¹² heirs, too, have it not.¹³ The whole is, however, now of little importance, as legal and general hypotheks have been granted against tutors and curators.¹⁴

Eighthly, all whose money has been used for paying a creditor in this class; but where they have stipulated for this transfer, they pass into possession of all the rights of the person so bought out; otherwise, they belong to this class.¹⁵

Ninthly, every one¹⁶ who has deposited or lent money gratuitously, without bargaining for interest, if he do not appear as vindicating his right to its return.¹⁷

The sequence is, then, thus:—the first excludes all the others; ¹⁸ the third¹⁹ follows the second; the rest come in *pro rata*,²⁰ except the eighth and the last, which occupies the last place; ²¹ and it is

4. For the restoration of a house. Building mortgages.

5. The wife and bride. The wife.

7. Claimant's guardians.

8. Payers of creditors in this class.

9. Gratuitous lenders.

The sequence as regards one another.

¹ P. 45, 5, 26, & 34; Lauterbach, de priv. person. simpl. § 27; Gmelin, l. c. 3 § 4, 5, § 5; Frister, l. c. § 10.

² Lauterbach, l. c. § 29; Thib. l. c. § 788, n. 9; Koch, de pec. ad emend. cred. § 15.

³ Boehmer, l. c. § 11, 12; Meissner, l. c. § 77; contra, Puf. 2, obs. 170.

⁴ P. 12, 1, 25; P. 42, 3, 1, 42, 5, 24, § 1; Dabelow, p. 197-8, 251-2; Frister, l. c. § 9.

⁵ Schulting, Th. controv. Dec. 97, n. 7; contra, Gmelin, 3, § 3; Frister, l. c.

⁶ P. 20, 2, 1; P. 42, 5, 24, § 1; Frister, l. c.; Meissner, l. c. § 79-80; contra propter, P. 17, 2, 52, § 10; P. 39, 2, 46, § 1; Walch, de priv. pec. in refect. cred. (opusc. v. 3) c. 2, § 7.

⁷ Contra propter, Nov. 97, 3; Walch, l. c. § 4; Frister, l. c.

⁸ P. 42, 5, 17, § 1 & 18; P. 23, 3, 74-8; Frister, l. c. § 15; contra, Feuerlien, de priv. dot. sponsæ compet. Helms. 1772; Walch, controv. p. 41.

⁹ Thib. l. c. § 789, nr. III.

¹⁰ P. 27, 3, 19, 20, 21, 25; Dabelow, p. 217-18; Frister, l. c. § 16.

¹¹ P. 42, 5, 22, § 1; Thib. l. c. § 391.

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¹² P. 26, 7, 42; P. 42, 5, 19, § 1.

¹³ Thib. l. c. § 789, nr. VI.

¹⁴ P. 42, 3, 2; P. 42, 5, 24, § 3; contra, Dabelow, l. c. p. 640; Frister, l. c. § 12.

¹⁵ P. 16, 3, 7, § 2; Id. 3 & 8; P. 42, 3, 24, § 2.

¹⁶ There is a great discrepancy in the laws on this subject; and, consequently, of the commentators, even to the extent of its being doubted, whether the deponent be the first or last of the privileged persons. Runde, ad § 1234, in fin. cit.; Lauterbach, coll. 16, 3, § 40-42, 5, § 15, § 53-55; Voet. 20, 4, § 12, 14; Hofacker, 3, § 4620; Dabelow, p. 315-19, 639; Frister, l. c. 3, § 18; Overbeck, de collatione dep. tam regul. quam irregul. in concursu. Hiedel. 1806; Neuchatel und Zimmer Untera. 1 B. nr. 2; Krant, de argent. et nummulariis, Goett. 1826, p. 115-122; Emerich in Linde Zeitsch. 5 B. 1 Hft. nr. 5.

¹⁷ Contra as to the first and second; Frister, l. c. 3, § 18.

¹⁸ P. 42, 5, 34 & 38, § 1; contra propter, Paul. R. S. 5, 12, § 10; Dabelow, p. 320-1, but erroneously; Thib. l. c. § 810.

¹⁹ P. 42, 5, 32.

²⁰ Thib. l. c. § 810, n. 9.

erroneous to suppose that persons worthy of compassion, and almspeople,¹ also that advocates, have any claim here for their fees.²

§ 1481.

The fifth class.

The fifth class comprises every imaginable claim strictly *pro rata*, under the following restrictions:—

1. Legatus and fidei commissarius.

Firstly, all persons who, as legataries and fidei commissaries, have no claim beyond on that which may remain after deduction of all debts, are to be first paid after all the creditors have been satisfied.³

2. Fiscal penalties.

Secondly, the fiscus for penalties, and all others whose claims for such have not been fixed,⁴ take the last place;⁵ nor does it matter whether an action have or have not been commenced for such penalty during the life of the common debtor.

Perhaps all claims for simple gifts, may be put into the same category.⁶

New creditors.

Lastly, should any balance remain after the satisfaction of all creditors, it can be claimed by such as have not applied;⁷ and, consequently, also from the new creditors.

§ 1482.

Jus offerendi consists in a secondary pawnee moving into the place of a primary one.

It often occurs that the claims of many pledgees are in collision with each other,—in which case it is a general rule, that he who has the preferable right takes precedence of him who has a less perfect one; but inasmuch as every *bonæ fidei possessor* can claim indemnity for money laid out and expended, so the possessor of the pawn can also claim this benefit.⁸ The secondary pawnee or hypothecar can, however, avoid this collision by getting into the place of the primary creditor, which is termed *jus offerendi*.⁹ This may be effected with the consent of the creditor or of the debtor,—of the former, by his consent to make over his prior claim;¹⁰ and of the latter, by the secondary hypothecar advancing the hypothecator the money to buy out the prior claimant under the condition of being put into his place, and which condition is ultimately in fact fulfilled.¹¹ The creditor so acquiring can, under certain circumstances, enforce his preference as against other hypothecarii;¹² nor does he who pays the fiscus form an exception from these rules.¹³

How effected.

The *actio quo minus* in the exchequer is referable to this origin, and, though it degenerated into a fiction, was founded on an

¹ Hellfeld, jurisp. for. § 1819; Walch, contr. p. 814.

² Glück, Pand. § 372, n. 63.

³ Gmelin, 6, § 3 & 4; Thib. l. c. § 806.

⁴ Hommel Rhap. obs. 548.

⁵ C. 10, 7, 1.

⁶ P. 49, 14, 17, 37 & 48, § 1; Meissner, l. c. 1 B. § 97 nr. III. contra; Hellfeld, de hypoth. fisc. § 9; Quistorp, Beitr. n. 33; Gmelin, 2, § 10.

⁷ Thib. Versuche, 2 B. S. 298; Puf. 3, obs. 86, § 4; Erleben, § 267.

⁸ P. 20, 4, 2, & 12, pr.; Weber, Versuche, 1 B. II. Abh. n. 3, § 21.

⁹ Beckmann, de succ. cred. in ulterius et suum ipsius locum, Goett. 1781; Dabelow, v. d. concurs. 1 Aufl. 2 B. § 290, seq.

¹⁰ Beckmann, l. c. 6-9.

¹¹ C. 8, 19, 1.

¹² § 1468, h. op.; Thib. l. c. § 781 & 800.

¹³ C. 7, 73, 3, & 7; Westphal. § 172.

accountant or debtor in chief to the crown praying an extent in aid of the king's debtors against a third party, on account of whose default to him he was unable to pay his debt to the crown.

The consent of both parties is necessary if a non-preference hypothecar wish to succede into the place of another hypothecar and of those in the same category with him;¹ he must, to effect this object, pay over to such preference hypothecar the amount of his claim on the pawn,² and reimburse to every third *bonæ fidei possessor*, such outlay as he may have a legal claim to demand;³ on the other hand, the preference hypothecar,⁴ according to the opinion of many, may retire into the place of a less privileged hypothecar, by other persons exercising a *jus offerendi*,⁵—upon which they, of strict right, have no claim. In neither case are the rights of a creditor whose position is between the two infringed.⁶

The conditions of the *jus offerendi*.

A third party who is in possession, though not as pawnee, has the power, when pawnee sues him, of demanding the cession of a *jus pignoris*, on paying the pawnee's debt.⁷

§ 1483.

As to general rules, the basis of the pignoratitium right must be legal: and in conventional hypotheks, all the formalities be observed which the law requires; which, of course, does not apply in the case of legal hypotheks.⁸

General rules, according to Thibaut, respecting the subject-matter.

Secondly, the subject-matter must be capable of hypothecation: and nothing is so capable which cannot be alienated, as the arms of a soldier, the instruments of a husbandman, and the like, else all descriptions of corporeal and incorporeal things are subject to hypothecation;⁹ consequently, no object is exposed to hypothecation which has been declared inalienable in such a manner that the alienation is null and void,¹⁰ nor anything which does not appertain to him whose property is subjected to the charge.¹¹ For these reasons, Thibaut observes,¹² that the general rules enunciated, respecting the disposal of the goods of another, have their application also here.

Must be susceptible of the hypothecation.

Nevertheless, should the property of another have been hypothecated,¹³ and the hypothecator subsequently acquire the ownership of it, the charge will become valid, provided there be *bona fides* on

As to the property of another.

¹ P. 20, 5, 2, & 5, § 1; C. 8, 18, § 5; C. 8, 20, 1.

² Thib. l. c. § 792.

³ C. 8, 27, 1; Weber, § 22.

⁴ Paul. R. S. 2, 13, § 3; C. 8, 18, 5; Glück, Pand. 19, B. S. 351-381; Müller, im Arch. f. c. P. II. B. 3 Hft. S. 386-92, S.; contra, Linde Zeitsch. 2 B. 2 Hft. nr. 20, 6 B. 2 Hft. nr. 5.

⁵ Haubold, de jur. off. Lips. 1793 (opus. T. 1, n. 12, 13).

⁶ P. 20, 4, 16; Hofacker, 2, § 1217.

⁷ P. 20, 4, 14.

⁸ P. 27, 9, 2 & 3, § 1; Westphal. Pfandr. § 126.

⁹ P. 20, 1, 11-16; C. 8, 17, 4; Struben, l. c. 3 B. 10 Bed.; P. 49, 16, 14, § 1; C. 8, 17, 7, 8.

¹⁰ C. 4, 51, 7; Meissner, § 39, seq. § 63.

¹¹ P. 23, 5, 4.

¹² P. R. § 791, et vide § 462.

¹³ P. 13, 7, 41; C. 8, 16, 5.

the part of the creditor ;¹ but should he be *malæ fidei*, then he has a *jus retentionis* or lien only, but no pignoratitian claim.² There is, however, a discrepancy in the law in cases where the owner is the successor of the hypothecator. It follows, from the above general principles, that a real servitude (easement) which has been created cannot be separately hypothecated,³ because it is the right on the property of another ; but, on the other hand, a *servitus rustica* is capable of hypothecation.⁴

§ 1484.

Extent of the
jus pignoris ;

to accessories ;

to emblements.

Not only has the creditor his *jus pignoris* on behalf of the principal debt, but also for the amount of damage due for the delay, the costs of suit, and necessary and advantageous expenses laid out upon the object, together with any interest agreed to be paid which may have become due ; and the same rule applies to a penalty agreed upon between the parties.⁵ The right extends to the principal object and its appurtenances, and to all accessory things which may subsequently accrue to it, according to the doctrine of the accession of things inseparably incorporated with the principal.⁶

Growing emblements and gathered fruits, it has been seen, are within the law ; but if produced before the accruing of the charge, are only distrainable, provided the creditor cannot be satisfied out of the principal object.⁷

§ 1485.

The obligation
of the pledgee
to keep safely.

Doctrine of the
culpa as applied
to pledges.

A very important question, is that of the degree of diligence imposed upon the pawnee for the safe custody and preservation of the pawn.

"As the bailment is for the mutual benefit and interest of both parties, the law requires that the pawnee should use ordinary diligence in the care of the pawn ; and, consequently, he is liable for ordinary neglect in keeping the pawn."⁸ This principle is dis-

¹ P. 20, 1, 1, pr. ; Gmelin, l. c. § 49-56 ; Bolley, l. c. § 53-55 ; Glück, l. c. 14, B. S. 29-32 ; Gesterding, S. 102-4 ; P. 20, 4, 9, § 3, comp. Meyer, Müller, et Löhr in Arch. f. C. P. 9 B. 2 Hft. S. 68-9 ; Gesterding, l. c. 104-111 ; Hepp. in d. A. L. 3, S. 497-597, 510-511.

² P. 13, 7, 41 ; P. 20, 1, 22 ; contra, Hofacker, 2, § 1172 ; Westphal. § 115 ; Bolley, § 56 ; Glück, l. c. 14, B. S. 32-40 ; Wenig, C. R. 1, B. S. 311 ; Arch. f. C. P. 9 B. 2 Hft. nr. 12.

³ But not personal servitudes, P. 20, 1, 11, § 2 & 15, pr. ; C. 8, 24, 1.

⁴ P. 8, 3, 14, 33, § 1 ; P. 20, 1, 11, § 3 ; Id. 12 ; Vinn. 2, S. 1, 22 ; Glück, l. c. S. 25-6 ; partially differing is Thomasius, de serv. still. Lips. 1689, § 17-21 ; Gmelin, § 59, 60.

⁵ P. 13, 7, 8, § 5 ; C. 4, 32, 4 ; C. 8, 14, 6 ; Weber, Beytr. zum. stillschw. Conv.

P. R. n. 3, in Vera. 1, B. II. Abh. n. 3 ; Meissner, § 14 ; Seuffert, Erört. einz. Lehren, S. 108-111.

⁶ The laws are in use as regards the child of a slave. P. 43, 33, 1, pr. ; P. 20, 1, 16, § 2 ; P. 13, 7, 18, § 2 ; C. 8, 25, 1 ; compare with P. 20, 1, 29, § 1, and P. 13, 7, 16, pr. & 21 ; P. 20, 1, 29, § 2.

⁷ P. 20, 1, 1, § 2 & 16, § 4 ; C. 8, 15, 3 ; C. 8, 28, 1 ; sed vide aliter putant Gmelin, l. c. § 41 ; Westphal. § 16 ; Voet. 20, 1, § 3, 4 ; Lauterbach, coll. 20, 1, § 32 ; Gottschalk, Es. for. I. c. 3, 18.

⁸ Story, Bail, § 332, Ed. 3 ; Jones, Bail, 75, 2 Kent Com. lect. 40, p. 578-9, Ed. 4 ; Bracton, 99, 6 ; Cogg v. Barnard, 2 Ld. Raym. 909, 916, per Ld. Holt ; Jones, l. c. 15, 21, 23, 75 ; Hein. Pand. lib. 13, t. 6, § 117-18 ; 1 Domat. B. 1, t. 1, § 4, art. 1 ; P. 50, 17, 3.

tinctly laid down upon this subject :—*Sed ubi utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in societate et dolus et culpa præstandus.*¹ *Ea igitur, quæ diligens paterfamilias in suis rebus præstare solet, a creditore exiguntur. Quia pignus utriusque gratia datur, etc. placuit sufficere, si ad eam rem custodiendam exactam diligentiam adhibent.*²

Thibaut³ thinks that the creditor, under a prætorian decree, is liable for gross negligence only ; here Ulpian, in his Commentary on the Edict, speaks of dilapidations of all sorts accruing to farms ; and it appears from that passage, that this species of creditor is in a better position than others.

It being then clear that the pawnee is responsible for every degree of *culpa* or negligence, and, consequently, that he is bound to the greatest degree of diligence, it remains to ascertain in how far he is required to answer for the *casus fortuitus*, or accident.

On general principles, responsibility for certain accidents is excluded in every bailment whatever. And here, again, Story⁴ lucidly lays down the true principle :—“ Losses from inevitable accident and irresistible force are excluded in every contract, although a liability may be created with respect to them, by some special contract or positive policy of law. By inevitable accident, commonly called the act of God, is meant any accident produced by any physical cause which is irresistible, such as a loss by lightning or storms, by the perils of the seas, by an inundation or earthquake, or by sudden death or illness.

The casus fortuitus.

“ By irresistible force is meant such an interposition of *human* agency as is, from its nature and power, absolutely uncontrollable. Of this nature are losses occasioned by the inroads of an hostile army ; or, as the phrase commonly is, by the king's enemies, that is, by public enemies. In the same manner, losses occasioned by pirates are deemed irresistible and by hostile force,⁵ for pirates are deemed enemies of the whole human race, *hostes humani generis* ; and by the common consent of nations they are, when taken, everywhere punished with death. By the law of nations they are esteemed outlaws, and their crimes, against whomsoever committed, are punishable in the courts of any nation within whose jurisdiction they are brought.”

Irresistible force.

Robbery by force, *rapina*, is also irresistible, and is, in the civil law, defined to be the violent taking from the person of another, of money or goods, for the sake of gain.⁶

Rapina.

¹ P. 13, 6, 5, § 2 ; P. 13, 7, 13, & 14.

² I. 3, 15, § 4 ; Ayliffe, Pand. B. 4, t. 1, p. 531 ; Jones, l. c. 29, 30, 31 ; Pothier de Nantissement, n. 32, 33, 34 ; Id. des obligations, n. 142, 1 ; Domat. B. 3, t. 1, § 4, art. 1, Ersk. ; Inst. B. 3, t. 4, § 33 ; 1 Bell, com. 453, Ed. 5 ; Id. § 399, Ed. 4.

³ l. c. § 790 ; P. 42, 5, 9, § 5 ; Lauter-

bach, coll. 20, 1, 19 ; v. Löhr, Theorie der culpa, S. 189-190.

⁴ l. c. § 25, Ed. 3.

⁵ Abbott on Shipping, P. 3, c. 4, § 2, 3.

⁶ I. 4, 2 ; Halifax, Anal. Civ. Law, 23, 79 ; Wood, Inst. C. L. B. 3, c. 7, p. 257 ; Jones, l. c. 29, 40, 44, 119 ; 10 Hen. 6, 21, pl. (5 Lib. Assisarum, 28).

Ulpianus¹ thus enumerates them, — *Animalium vero casus, mortes, quæque sine culpa accidunt, fugæ servorum, qui custodiri non solent, rapinæ tumultus, incendiæ, aquarum magnitudines, impetus prædonum a nullo præstantur*. Vinnius² details them more at length, — *Casus fortuiti varii sunt, veluti a vi ventorum, turbinum, pluviarum, grandinum, fulminum, æstus, frigorio, et similibus calamitatum quæ cælitus immittuntur*. Nostri vim divinam dixerunt; *Græce Θεοῦ βλαβ.* Item naufragia aquarum inundationes, incendia, mortes animalium, ruinæ ædium, fundorum chasmata, incursus hostium, prædonum impetus etc., *fugæ servorum qui custodiri non solent*. His adde, *damna omnia a privatis illata quæ quo minus inferrentur, nullâ cura caveri possunt*. Ad casus autem fortuitos non sint referendi illi casus qui cum culpa conjuncti esse solent: *cujusmodi sunt furta*. Quamobrem, qui rem furto amissam vel incendio verbi causâ servorum negligentia orto consumptum dicit, *is diligentiam suam probare debet*. Quod vero incendium in alienis ædibus obortum occupat ædes vicinas, aut quod fulmine excitatur, aut a grassatoribus vel incendiariis immittitur id inter casus fortuitos numerari debet. And here the distinction between impetus prædonum and furtum is important; the pawnor or bailor bears losses by the first, the pawnee or bailee, then, by the second: thus, *impetus prædonum a nullo præstantur*; but *quod si furibus subreptum sit, proprius ejus detrimentum est*³ quia custodiam præstare deberit, qui æstimatum accepit.⁴

Such, then, are the duties of the pawnee founded upon the doctrine of the *culpa* and the *casus fortuitus*.

Obligation as to the produce of the pawn.

Another obligation to which he is exposed is, that of preserving the produce of the pawn for the debtor, and of adding it to the capital.⁵ Much depends upon the nature of the pledge; if it be of a cow or of a horse, the pledgee may milk the former, though he must account for the profits, and may keep the horse in exercise, for those acts are incidental to, and constitute due diligence;⁶ but generally, nothing is to be used which is not deteriorated by lying idle; for Gordianus says, — *Si quidem, qui rem depositam, invito domino, sciens prudensque in usus suos converterit, etiam furti delicto succedit*.⁷

§ 1486.

Distractio pignoris.

Engagement not to sell a pawn void.

The most important right connected with all pledges and hypotheks, is the right of distraint or sale for satisfaction of the debt for security of which they are given, — hence an engagement not to sell a pawn, being in itself contrary to the fundamental principle, is

¹ P. 50, 17, 23; P. 13, 6, 5, § 4; P. 4, 9, 3, § 1.

² Vin. ad I. 3, 15, § 2, n. 5.

³ Story, l. c. § 35; citing Jones, l. c. 44, n. 0; Gôth. com. in L. L. contractus, p. 145; Van Leunwen's, ed. of the Pandects, 17, 2, 52, § 3, n. 22, 24, ed. 1726; P. 50, 17, 23; P. 13, 6, 18.

⁴ P. 13, 6, 18.

⁵ P. 13, 7, 35, § 1.

⁶ Pothier, Tr. de Depot. n. 47; Id. de Numb. n. 35; P. 16, 3, 29, § 1; Jones, l. c. 81, 82.

⁷ C. 4, 34, 3; P. 16, 3, 29. The rule of most other nations is broader, — viz. that if from circumstances the use may be implied, it is lawful, vid. Story, l. c. § 90.

null and void.¹ But, on the other hand, the *lex commissoria*, or contract whereby the pledge becomes the property of the creditor without sale, in default of payment of the debt, is null and void,²—though the canon law admits a case when confirmed by oath; but even then it is of no avail, if subsequent to the transaction. The contract will not, however, be open to the objection of being commissory, if it be agreed, at the time at which the charge originated, that the creditor might retain the object in default of payment, by way of purchase, for a price then or thereafter to be agreed upon, or that it should lapse to the sureties of the insolvent debtor.³

In the first place, the creditor is not at liberty to sell until his claim be fully due and payable,⁴ and he is then bound to give the debtor notice, *denunciatio*, of his intention to distrain; after which, the debtor has two years to pay and redeme.⁵ The contract not to sell has, however, in so far effect, that it throws upon the pledgee the *onus* of three notices⁶ and applications for payment; nor does it appear what time must elapse between these several notices,—some, and Thibaut⁷ among the number, think, reasoning from the analogy of the first case, that two years must elapse after the last notice; but how long between each notice? some think, by the same analogy, two years, making six in all before execution can be had. This, however, appears unlikely, on account of the arrear of interest which would accrue in six or seven years, which might amount to near the value of the thing pledged; to which it may be answered, that the creditor must at first leave sufficient margin and prepare for this contingency. After the expiry, then, of the legal terms, the sale may take place on a certain fixed day,⁸ and will be valid if the subject-matter be capable of sale; but if not so, and if the prescribed formalities have not been observed, the sale, though effected, will be null and void,⁹ except, indeed, it be effected under authority of the court, which is held to dispense with those formalities;¹⁰ but even then a sale will not be valid, if a creditor whose claim is second to that of another sell of his own motion before his preference creditor have been

When the creditor can sell.

Sale, when void.

¹ C. 8, 35, ult.; Pol. Ordn. v. 1577; Tit. 20, § 5; but if confirmed by oath, vide X. 3, 21, 6; Gesterding, Nachf. 1, B. S. 78-9; cont Glück, l. c. 14, B. S. 93-5.

² C. 8, 14, 13, is no sufficient ground to the contrary.

³ P. 20, 1, 16, § ult.; P. 18, 1, ult.; Westphal. § 194; Gothof. ad L. 1, C. Th. de commissorio rescend.; Emminghaus ad Cocceii, 7, 13, 10; contra, Weber, Versuche, 1 B. n.; V. Gönner, Jur. Abh. 1 B. n. 7, § 5; Seuffert, Erört einz. L. 2, Abth. S. 98-108; vide et Glück, l. c. 14, B. S. 95-103.

⁴ C. 8, 28, 5; Wening in Linde Zeitsch. 1 B. 3 Hft. nr. 18.

⁵ C. 8, 14, 10; C. 8, 34, 3; Erxleben, § 187; pro parte contra, Gesterding, S.

180-193, 202-204. The ante-Justinian law required a *trina denunciatio* in cases where the day had not been fixed for payment or sale of the pledge, or where the pledge had been granted unconditionally (*simpliciter*)—I. 4, 7, 1; P. 13, 7, 4; P. 47, 2, 73; Paul. R. S. 2, 51.

⁶ P. 13, 7, 4.

⁷ l. c. § 796; ibique cit. Zimmer in Linde Zeitsch. 1 B. 1 St. S. 51-53. Originally, probably, three successive market-days, the *trinundinum*; or about thrice nine, or twenty-seven days in all, after the expiry of the year.

⁸ P. 6, 1, 65; C. 8, 30, 2.

⁹ P. 6, 1, 65; C. 8, 30, 2.

¹⁰ Mevius, P. 7, Dec. 310; P. 8, Dec. 260.

satisfied ;¹ but Justinian ruled that any mode of sale prescribed by the parties should be valid in law.

Sale, how effected.

The creditor being regarded as the mandatary of the debtor, is under the obligation of being present, and of taking care that the sale be conducted in the forms prescribed by law, and of attending to the interest of the pawnor in all respects.²

The same is the law of the sale of unredeemed pledges in England which must be sold by public auction, and the surplus of the sum the sale produces, over and above the debt, be paid over to the pawnor.

Effects of fraudulent sales.

A fraudulent sale gives the debtor a personal action against the creditor ; and if recourse against him be impossible, the debtor can have restitution against the buyer.³

The creditor can, however, sell non-judicial pledges extrajudicially of his own authority ;⁴ but even then the sale must be effected publicly, and the debtor must be summoned to be present.⁵

Judicial pledges auctionable in two months.

Judicial pledges, on the other hand, are auctionable under judicial authority in the accustomed form two months after default,⁶ with the additional advantage to the creditor of a right of pre-emption,⁷ which it has been seen is not the case when the creditor puts up a pledge for sale extrajudicially,⁸ without the consent of the debtor.⁹ But in both cases, if no bidder offer a reasonable price, the creditor may obtain an assignment of the pledge for a price to be settled by the sovereign of the country ;¹⁰ nor does the sum so assigned operate as a total extinguishment of the debt, but only of as much of it as the price represents.¹¹ The debtor, however, on his part retains the right of redemption during two years.¹²

The creditor cannot be compelled to sell.

The creditor cannot be compelled to sell, except the debtor give security for the payment of the debt in full ;¹³ the creditor, again, in cases of doubt, has, if he put up the free hand pledge for sale, the right of election, where there are more pledges than one in his possession, as to that which he will sell, so long as he sell no more than is strictly necessary to satisfy his claim,¹⁴ and that he begin by selling those things which the debtor is best in a condition to spare.¹⁵ Neither by the Roman nor by the English law can the seller become a purchaser.¹⁶

¹ P. 20, 5, 1 ; C. 8, 18, 8 ; C. 8, 46, 1 ; Löhr im Arch. f. C. P. 14 B. 2 Hft. S. 171 ; contra, Bopp. in Linde Zeitsch. 3 B. 2 Hft. nr. 12 ; et im Arch. f. C. P. 15 B. 3 Hft. nr. 17.

² P. 21, 2, 50 ; C. 8, 28, 4.

³ C. 8, 28, 4, 7, 9, & 10 ; C. 8, 30, 3 ; Westphal. § 220.

⁴ C. 8, 28, 9 ; C. 8, 34, 1.

⁵ C. 8, 28, 4 ; C. 7, 53-3 ; Voet. 20, 5, n. 5 ; contra, Glück, l. c. 19, B. S. 392 ; sed vide Thibaut, l. c. § 797.

⁶ P. 42, 1, 31 ; C. 8, 34, 2.

⁷ C. 8, 23, 2, 3.

⁸ C. 8, 28, 10.

⁹ P. 13, 7, 34.

¹⁰ C. 8, 23, 2, 3 ; P. 13, 7, 24 ; Err-

leben, § 188. There is a difference of opinion on this point as to the present continental practice.

¹¹ P. 42, 1, 15, § 3 ; C. 8, 34, 3, § 4.

¹² C. 8, 34, 2, & 3, § 3 ; Westphal. § 193-4-9 & 201.

¹³ P. 13, 7, 6 ; Löhr Mag. 4 B. 1 Hft. S. 139-40.

¹⁴ P. 20, 5, 8, 11, ult. ; C. 8, 28, 6, 7, 8 ; P. 13, 7, 6.

¹⁵ Thib. l. c. § 785, 792-797 ; Voet. 20, 5, § 3 ; Erleben, § 183, § 1488, h. op.

¹⁶ C. 8, 28, 10 ; Ayliffe, Pand. 4, 18, p. 534 ; Story, l. c. § 319 ; ld. Equity Jurisp. § 308-323 ; Kemp. v. Westhrook, 1 Ves. R. 275.

§ 1487.

The *jus pignoris* may be extinguished in nine different ways :— Extinctio juris pignoris.

- By consolidation and confusion.
- By extinction of the principal obligation.
- By expiry of the contract.
- By destruction of the pawn.
- By extinction of the pawnor's right.
- By contumacy.
- By misuse.
- By renunciation.
- By sale.

Many of these principal divisions have their subdivisions, which it will be the object of the following paragraphs to examine and demonstrate.

§ 1488.

First, then, the *jus pignoris* being merely accessory to another right, is extinguished by consolidation,¹ that is, by the property in the pledge vesting in the pawnee, or the right of the pawnee devolving on the pawnor, or by confusion,² or its inseparable mixture with the property of the pledger.

Secondly, if the debt,³ as security for which the pledge was constituted, be utterly extinguished by payment, or some other means, the accessory *jus pignoris* is extinguished with it, upon the common rule of principal and accessory. A so-termed *novatio privata*⁴ has a similar effect. *Novatio* is described to be *prioris debiti in aliam obligationem, vel civilem vel naturalem transfusio atque translatio, hoc est, cum ex præcedente causâ, ita nova constituitur, ut prior perimatur*; by consenting to such novation without providing for a reconstitution of the right, the pawnee is held to have waived it, and the effect where he has not done so has been already alluded to.⁵

Thirdly, if the pawnee allow the time to pass for which the pledge was constituted, he must suffer for his own default, and lose his right.⁶

Fourthly, if the subject-matter of the pawn be utterly destroyed, the right is extinguished. This may be effected by specification, which is here of two kinds, extinctive and converse, —here the rule is, that if the object cannot be restored to its original state, the specification is extinctive, and no right attaches; thus, if a wood

¹ P. 13, 7, 20, § 3 & 24, pr.; P. 20, 6, 9, pr.

² Lauterbach, de confus. § 47.

³ P. 13, 6, § 12; Averan. interp. 2, 234.
7; Lauterbach, coll. 20, 3, § 3-6.

⁴ P. 42, 2, 18; Meissner, § 49.

⁵ § 1475, h. op.

⁶ Erleben, § 3, 30; contra, Leyser, Sp.

be hypothecated, and the hypothecator build a house of the wood, no hypothecary right attaches upon it; but if it can be so restored, the right continues to attach: thus, if the hypothecator make a silver waiter out of a silver pot, which is converse *specificatio*, such pot remains hypothecated.¹ In the case of a general hypothek, however, if the debtor himself operate the specification, the right attaches,² because it extends to all his property, independently of the specification, or any change in the form of the individual thing.

5. By extinction of the pawn or right.

Fifthly, if the pawnor lose his right, the pawnee loses his claim, which is merely accessory to the right of the debtor. Now, if the object were not the property of the pawnor, but he possessed merely a right upon it, the right expires with his right;³ but if the object was his property, the right remains valid.⁴ Now, it may return to him by his own volition or it may not; if the property be recalled *ex nunc*,⁵ the right remains good;⁶ but if it be recalled *ex tunc*⁷—that is to say, be extinguished by a *conditio resolutive* made at the time of its acquisition—the right is lost.⁸

6. By contumacy.

Sixthly, if the creditors on hypothek be edictally cited, *edictaliter vocati*, and fail to appear, whereby they are precluded,⁹ they have lost their right (see former sentence ad fin.).

7. By misuse.

Seventhly, if the creditor have ill-treated a slave impignorated to him, he forfeits his claim¹⁰ as a pawnee.

8. By renunciation.

Eighthly, the hypothecarius, as a pawnee, also loses his claim, if he renounce his right¹¹ by word¹² or deed.

9. By sale.

Ninthly, the sale of the pawn will operate its release upon the presumption of tacit renunciation. Now, if the creditor who has the preferable right sell his pawn, do so, there is no doubt that claims in virtue of the secondary or inferior right are extinguished; but the converse does not apply,—for the secondary pawnee cannot sell without consent of the preference creditor.¹³

But if the creditor gave his assent to the alienation by unmistakeable words or deeds, the right is lost;¹⁴ such deed may, perhaps, be the fact of his consenting to a further impignoration.¹⁵ In the former of these cases, the sale must be regular, and actually

¹ P. 20, 1, 13, 16, § 2 & 29, § 2, 34, & 35; P. 20, 6, 8; Höpfner in Hein. § 720.

² P. 13, 7, 18, § 3; P. 20, 1, 16, § 2, Westphal. § 250; Erleben, § 338.

³ P. 20, 1, 31; C. 8, 24, 1; Trummer, de effect. hypoth. post. resolut. dom. Lips. 1741, § 12-21; Gmelin, de I. P. vel H. quod creditor deb. in re sibi non propr. const. § 8, 9; Arch. f. C. P. 8 B. 2 Hft. nr. 11.

⁴ P. 18, 2, 4, § 3; P. 21, 1, 21, § 1.

⁵ Thib. l. c. § 725.

⁶ Vinn. Q. S. 2, 5; Trummer, § 22-37; Gmelin, § 6.

⁷ P. 20, 6, 3.

⁸ P. 18, 2, 4, § 3.

⁹ P. 8, 26, 6; Puf. 1, obs. 131; Müller ad Leyser, obs. 475.

¹⁰ P. 13, 7, 24, § ult. This does not apply to all abuses.

¹¹ P. 2, 14, 3; P. 34, 3, 1, § 1; C. 8, 26, 7.

¹² Vermehren, Arch. f. C. P. 13, B. 1 Hft. p. 42-47.

¹³ C. 8, 20, 1; Voet. 20, 5, § 11, 12.

¹⁴ P. 20, 6, 4, § 1 & 7, pr. & 8, § 6; Thomasius, de remis. pign. vel hypoth. per remis. deb. et consens. in alienet. Hal. 1713; Püttman, advers. c. 7.

¹⁵ P. 20, 6, 12, pr.; P. 20, 17, 12, § 4; Hofacker, 2, § 1227; Glück, Pand. 19 B. p. 429-436; contra, Beckmann, de succ. cred. § 13; Dabelow, v. Conc. 1 Aufl. § 301; Thomasius, de remis. tac. pig. per cons. in nov. oppign. Hal. 1715.

take place;¹ neither must the negotiation be broken off before its perfection, nor reversed after it, on a ground arising out of the transaction itself.²

Now, let it be supposed that the pawn has been sold by the debtor without the consent, express or tacit, of the creditor, it may be with or without his knowledge. If the pawn consisted in a head of cattle in a herd, or in an article in a store, or an *universitas servorum*, the pawn is forfeit.³

With or without privity of the creditor.

In like manner, it is extinguished positively when the creditor fraudulently ignores the sale,⁴ or when the fiscus, or prince or princess of the country, sell the things they have impignorated,—in which case, the creditor has, nevertheless, his claim of indemnity from the seller, except, indeed, he shall have failed to oppose the sale when he had the right of doing so.⁵

By fraud. Exception and remedy.

Thibaut⁶ mentions a particular exception under the *beneficium inventarii*, whereby the right of the heir is protected against the claims of all hypothecars, where he has sold an impignorated thing belonging to the estate; in which case, the creditors must seek redress against legatees and less favored creditors who have been satisfied.⁷

The beneficium inventarii protects the heir.

But the creditor's right on pawns sold without his knowledge or consent is never impaired or extinguished.⁸ If, however, the sale took place with his knowledge, but without his especial consent, his right is only lost if the debtor sold illegally, and not if he sold in a case where sale was permissible.

Right on pawns sold without creditor's privity not extinguished.

If, then, it be known that a debtor may sell generally, but not especially hypothecated moveable and immoveable things (except the case mentioned in the fifth paragraph back) without the consent of the creditor, it follows clearly, from the above, that the right is lost.⁹

General right of debtor to sell extinguishes the right.

§ 1489.

Originally, as has been seen, the *jus pignoris*, as being a mere *pactum*, gave no remedy by action against the debtor, so long as it remained in his possession,—and none whatever against a third possessor; to remedy which inconvenience, Servius, who by some is said to have been a prætor,¹⁰ by others the great lawyer Servius Sulpicius,¹¹ granted a real action to the landlord of a *prædium*

Remedies by action.

Origin of the actio Serviana.

¹ P. 20, 6, 8, § 6.

² C. 8, 26, ult.; P. 20, 6, 10.

³ § 1466, h. op.

⁴ Franke, comm. L. 20, T. 6, n. 44.

⁵ C. 7, 37, 2, 3; C. 8, 26, 8; Lippert, *passim* in *Zul. zu Rhein. Beitr.* 3 B. 1 Hft.

⁶ l. c. § 876, § 818.

⁷ C. 6, 30, ult. § 4; Nov. 1, 2.

⁸ v. Bülow as to general pawns, *Abh. Bruns.* 1817, p. 1-56; contra, Seuffert *Erört. einz. Lehr.* 2 Abth. p. 89-98.

⁹ C. 8, 28, 12, & 17; C. 8, 26, 1, & 10;

C. 8, 14, 15; C. 7, 8, 3; P. 47, 2, 19, § 6 & 66, pr.; Westphal. § 20-1; contra, Schwabe on the non-authorization of the debtor to sell without the consent of the creditor (German), Erfurt, 1806; and as to moveables, Gesterding, *Pfändr.* p. 155-7.

¹⁰ Walter, *Geschichte des Röm. Rechts.* § 587, Bonn. 1846.

¹¹ Leger, *dis. hist. J. C. de pig. taciti contractus*, Append. p. 2; Hein. A. R. 4, 6, § 29; Cic. pro Muræna, 20; Brisson. de Form. 5, p. 382.

rusticum, to claim an object deposited with him as security for the rent, whence it acquired the denomination of *actio serviana*. This action presumes that a *prædium rusticum* has been let to hire—that the farmer owes rent—that an action is brought against the occupier for the produce gathered *fructus percepti*, or, against him for the moveables with which it is stocked, *invectorum et illatorum*, if such should have been otherwise expressly pledged for the rent, and it prays that these objects be delivered to the plaintiff by the possessor.¹

Fundamental
idea of the dis-
tractio pignoris.

The fundamental idea is, that the *object itself* is obligated for the debt, and must in case of need pay; hence it follows, that the creditor can demand the conversion of the object into money.²

§ 1490.

Pignus volun-
tarium esta-
blished by
imploratio,

When a *jus pignoris voluntarium* is sought, that is, when an application for the judicial award of such a right is prayed, it is done simply by *imploratio*,³ and receives its name from the nature of the transaction; but when it is on a right already in existence, it is partly petitory, partly possessory.

actio pigno-
ratitia,
directa et con-
traria,
actio pignora-
titia, utilis et
factum.

The petitory or precatory lies between debtor and creditor,—when by the former, it is termed *actio pignoratitia directa*; but when by the latter, *contraria*; whereby both parties have to prove their respective rights.⁴ It, strictly speaking, presumes a *contractus pignoratitius*; but many laws admit an *actio pignoratitia utilis* and *in factum*⁵ (which is an equitable relief) as regards personal obligations as to other pignoratitian rights.

This action can be, in its capacity of a personal one, *directa*, on termination of the pignoratitian right,—but, from its very nature, does not lie against a third party, who must be reached by an *actio dominii*; but it may be remarked, that the *actio pignoratitia directa* will lie against a third party, if the creditor impignorated the object to him at the request of the debtor, or if he have ceded his claim to this latter. This is, however, as little a juridical exception from the above principle, as the admission of an *actio in factum*, in cases where the third party had personally bound himself in some way to the representative of the pawnor, for the return of the object to him.⁶

§ 1491.

Remedies
against third
parties.

The creditor has many legal remedies, as against third parties, such as the *actio finium regundorum*,⁷ *confessoria*, and *negatoria*

¹ Höpfner, in Hein. § 722.

² Walter, l. c. 589; Gaius, 2, 64; Paul. R. S. 2, 13, § 5; P. 13, 7, 4.

³ Erxleben, § 267.

⁴ Schmidt, v. d. Kl. u. Einr. § 820 29.

⁵ P. 13, 7, 11, § 5; P. 39, 2, 34; P. 42, 5, 9; Meissner, l. c. objects to the term, § 46.

⁶ P. 13, 7, 13, pr. & 27; C. 8, 24, 2; C. 8, 30, 2, 3, 4; X. 3, 21, 6; Westphal. § 144, 220-1, 258; Müller ad Leyser, obs. 342; Köchy, med. 1, p. n. 17, 168; Trexenius de Pignoratitia act. adr. test. non comp. Heidelb. 1751.

⁷ P. 10, 1, 4, § 9; P. 8, 1, 16.

utilis.¹ In cases of theft, the common actions arising out of that defect are available,² as well as an action for the institution of the *cautio de damno infecto*;³ but the detail of these actions do not belong to this place.

Actiones finium
regundorum,
confessorie, et
cautio de damno
infecto.

The Servian action was extended to all hypotheks under the title of *Actio quasi serviana*, otherwise *hypothecaria*, which arises out of a real right; the Romans term it variously,—*actio serviana* when it is brought by the landlord, and *quasi serviana* or *hypothecaria* when it applies to others;⁴ sometimes it is implied under the term *pignoratitia*.⁵

Actio serviana
et quasi serviana.

§ 1492.

The hypothecarian action presumes the existence of the right; and can, on account of the indivisibility of the right of pledge, be only evaded by the payment of the claim in full;⁶ it lies against every possessor for the recovery of the subject of the right belonging to the plaintiff.⁷

Actio hypothe-
caria.

The *actio hypothecaria* arises out of a *pactum*, whereby the debtor assigns to the creditor a claim on a certain thing; but this gave no remedy against third parties, until extended as against them, by the Servian edict, as respected all hypotheks.⁸ In like manner the *interdictum salvianum*⁹ arose, giving a possessorial remedy proper to hypotheks, which is one of the *remedia adipiscendæ possessionis* which the creditor has against third persons;¹⁰ but the *quasi salvianum* lies by other hypothecary creditors, for obtaining possession of the hypothek, against the pledger only.¹¹

Its basis.

Remedies for
obtaining
possession.

The advantage of the *actio hypothecaria* is to be sought in the summary nature of its process; perhaps the *interdictum ex L. 3, C. de pignoribus* may be added.¹²

Interdic. ex L.
3, C. de pig.

In the case of a *pactum de ingrediendo* having been concluded between the debtor and creditor in hypothek, whereby the former permits the latter to enter into possession of the object in case of default of payment, an *ex parte* taking of possession is allowed by the hypothecarius, but recourse must be had to the assistance of the court,¹³ if the hypothecator, disregarding the compact, should

The pactum de
ingrediendo.

¹ The communi dividundo will not lie, Thib. § 715. The mortgage creditor of a co-owner cannot call upon the other co-owner to divide, because this is not in his power, although he may be required to do so by such co-owner.

² P. 13, 3, 2; P. 47, 2, 87; Voet. 13, 1, § 3.

³ P. 39, 2, 11.

⁴ I. 4, 6, § 7; Schmidt, l. c. § 487 & 491.

⁵ P. 13, 7, 41; P. 10, 4, 3, § 3; P. 13, 7, 9, 13, 25.

⁶ P. 13, 7, 11, § 7; P. 20, 1, 19; C. 8, 32, 1, 2; C. 8, 28, 16.

⁷ P. 20, 1, 13, § 4; Id. 16, § 5; Lauterbach, coll. 20, 1, § 76.

⁸ Walter, l. c. § 588, thinks that this

was adopted into the Roman law from the law of the Peregrini, Cic. ad fam. 13, 56.

⁹ I. 4, 6, § 7; Theophil. 4, 6, § 7.

¹⁰ Gaius, 4, 147, § 3; I. 4, 15, § 1; P. 43, 33, 1, & 2; C. 8, 9, 1.

¹¹ I. 4, 15, § 3; C. 8, 9, 1; Höpfner, § 1214; Meissner, § 44; Carract, obs. quæd. ad interdict. Salo. Hal. 1774; Püttman, de Int. Sal. Lips. 1773; Thib. Abh. im Arch. f. C. P. II. B. 3 Hft. nr. 15; Hepp. in d. A. L. Z. 1832, p. 632-36; varying; Zimmermann Linde. Zeitsch. 1 Hft. p. 54, 56; Huschke, Stud. h. nr. IV.

¹² Schmidt, l. c. § 174.

¹³ Puf. 2, obs. 62; Struben, 2, B. 32, Bed. 3, & B. 57, Bed.

Remedies for recovery of possession. Remedies for retention of possession.

oppose the hypothecarius doing so. In such case, the proper remedy would be in the above-mentioned edict, were the plaintiff not expressly referred to the *interdictum salvianum*.¹

Secondly, as another *remedium recuperandæ possessionis*, the plaintiff has his *interdictum unde vi*, and his *actio spoli*;² and,

Thirdly, as a *remedium retinendæ possessionis*, his *interdictum uti possidetis* and *utrubi*;³ he may also seek redress in the *interdictum quod vi aut clam* and *de precario*;⁴ as also in the *novi operis nunciatio*.⁵

§ 1493.

The actio hypothecaria does not properly lie in the alternative.

The actio hypothecaria cannot, properly speaking, be brought as a real action in the alternative, either against the debtor or against a third party, for delivery of the object or payment of the debt, unless a personal action be combined with it.⁶

Its necessary acquirements as regards the parties;

In order to succeed, the plaintiff must prove the foundation of his right. When this action is brought against another hypothecarian creditor or against a third party, it must be ascertained whether the defendant acquired the object from the hypothecator of the plaintiff, or from some other person. In the first case, the plaintiff has to prove that the object had been already hypothecated to him when the defendant acquired a right upon it from the hypothecator; but in the second case, he must prove that the object did actually so belong to the hypothecator at the moment at which it was hypothecated to him, so that such person could succeed against the present possessor according to the principles of an *actio dominii*, or at least of the *actio publiciana*.⁷

as regards special exceptions;

Secondly, the plaintiff must not be vexed by any special pleas or exceptions,—thus the debtor or another hypothecary cannot except; that the plaintiff must confine himself to the special pawn, when such has been granted to him in addition to his general hypothek.⁸

as regards third parties.

The third possessor,⁹ with one exception,¹⁰ can, moreover, require the plaintiff to sue, first of all, the chief debtor and his sureties; of course, if a hypothek given by one of the sureties be prosecuted, the possessor of the pawn given by the chief debtor must be first sued to judgment, which is termed the *exceptio excussionis*, except, indeed, the case be such that, from some

¹ Gönner, Handb. 8 Proc. 4 B. n. 55, § 38, n. b.

² P. 43, 16, 1, § 9.

³ P. 13, 7, 35, § 1.

⁴ P. 43, 26, 6, § ult.; P. 43, 24, 11, § 14.

⁵ P. 39, 1, 9.

⁶ In Germany this, however, is admitted, Exleben, § 312; Boehmer, de Act. Serb. 2, 3, § 8; Wernher, lect. com. 20, 1, § 10; Schuster, wie ist das compensations recht, etc., Vienna, 1830, p. 101-156.

⁷ Thib. l. c. § 815, § 713; P. 13, 7, 41; P. 20, 1, 15, § 1; Id. 18.

⁸ Nov. 112, 1.

⁹ Nov. 4, 2; Koch, de benef. excuss. tertio hypoth. spec. possessori compet. Gress. 1772; Schlütter, de benef. excuss. poss. hyp. gen. et spec. comp. Goett. 1776; Puf. 3 obs. 67; Müller ad Leyser, obs. 456; contra, Voet. 20, 4, § 3.

¹⁰ Nov. 112, 1.

particular cause, this plea of excussion is inadmissible on general principles.¹

The fiscus, too, must submit to this plea of excussion;² because, before the regulations of the Novellæ came into force, there was no particular law specially applicable to that department.

The fiscus liable to the exceptio excussionis.

§ 1494.

The English law of pawns and pledges is substantively the same as that of Rome; but there are, nevertheless, certain striking distinctions between the two systems.

The English law of pledges differs from the Roman,

Blackstone³ lays it down that an express contract arises between the pawnor and pawnee with respect to the goods, to which the condition to restore them upon payment of the debt in due time is annexed.⁴ The *special* property thus accruing to the pawnee is to be distinguished from the *general* property residing in the pawnor.⁵ A factor, however, has but a special lien⁶ by the Roman law; on the contrary, the pawnee has a simple right of retention or detainer, but no special property, and therefore is rather in the position of a factor in England, *pignus manente proprietate debitoris solam possessionem transfert ad creditorem*.⁷

in passing a special property to the pledgee;

By the English law a pawn is liable for the particular debt only for which it has been deposited as security; but by the Roman law it is prospectively, and retrospectively, and presently liable for all engagements of the pawnor to the pawnee.⁸

in the restricted liability of the pledge for the sum lent;

By the Roman law a creditor might, after constituting of a pledge by delivery, restore the object to the possession of the pledger, either on hire or under any other contract, without prejudice to his right. *Si pignus mihi traditum locassem domino, per locationem retineo possessionem; quia antequam conduceret debitor non fuerit ejus possessio; cum et animus mihi retinendi sit, et conducendi, non sit animus possessionem adipiscendi*;⁹ but this principle has not been imported generally into the law of continental Europe, on account of its giving rise to too much ambiguity; where it has been admitted in particular cases, it is to be regarded as an exception, and is jealously restricted.¹⁰

in the letting a pledge to the proprietor;

The Roman law permitted a pawnee to repledge goods to the extent of his interest therein, *jure pignoris teneri non posse, nisi*

in the right to under, or repledge, beyond interest;

¹ Lauterbach, l. c. § 75.

² Meissner, l. c. § 111; P. 50, 15, 5, § 3.

³ Com. vol. 2, B. 2, ch. 30.

⁴ The law relating to pawnbrokers is regulated by statutes,—30 Geo. II. 24, as to interest; 39 & 40 Geo. III. 99, as to illegal pledging; 2 & 3 Vic. 71, § 28, by persons under sixteen; 2 & 3 Vic. 47, § 50; vide et 5 & 6 Will. IV. 62, § 12.

⁵ Story, Bail, § 287 et § 307; Ryall v. Quarles, 1 Atte. R. 167; Jones v. Smith, 2 Ves. jr. 378; Lickbarrow v. Mason, 6

East, R. 25; Cortelyou v. Lansing, 2 Caius, Err. 200; Badlam v. Tucker, 1 Pick. R. 389, 397; 2 Story on Eq. Jurisp. § 1030; 1 Dane Abridg. ch. 17, art. 4, § 11; Concardo v. Alantic. Jansen Co. 1 Peters, R. 449; Post, § 307.

⁶ Story, Bail, § 327; Jarvis v. Rogers, 15 Mass, R. 408; see also Homes v. Crane, 2 Pick. R. 610.

⁷ P. 13, 7, 35, § 1.

⁸ Story, Bail, § 304.

⁹ P. 13, 7, 37.

¹⁰ Story, l. c. § 299, ibique cit.

quæ obligantis in bonis fuerint; et per alium rem alienam invito domino pignori obligari non posse certissimum est,¹ but not beyond it,—for *nemo plus juris ad alium transferre potest quam ipse haberet*;² and, by the law of England, a factor, with an apparently good title, may repledge goods upon which he has made advances to the full value of such advances.³

in the allowance
of expenses;

The common law allows no expenses laid out upon the pawn without a contract to that effect, neither has the court discretion; but the Roman law allowed such expenses as should be awarded by the court.⁴

as to tacit
pledges or liens;

These are the principal differences between the rules of the common and the civil law; both admit tacit pledges, as that of a landlord for rent, the authorities for taxes, the warehouseman and carrier for goods bailed to them; though these are termed liens, and though differing in name, are similar in effect to the *pignus tacitum* of the Romans. The claim of the holders of bottomry bonds, of maternal men, and of sailors on the ship for wages, are in a peculiar category; the interest cannot be termed a pignoratitium for want of possession, nor a lien for the same reason, nor a mortgage, because the property has not passed; this right can, therefore, only be described as an hypothecary interest, a sort of middle thing, or admixture of lien pledge and mortgage.

as to the sale by
creditor not
compellable;

The pledge being a collateral security where there is no contract on the part of the pledgee requiring him to sell the pledge, he is not compellable by common law to do so; but a court of equity may compel the sale, if the pledge be of a perishable nature, or would at the time realize sufficient to discharge the debt.⁵ By the Roman law the pawnee can be so compelled to sell, with the remark, however, *invitum enim creditorem cogi vendere, satis inhumanum est*.⁶

as to action for
another pledge;

The common law gives no action for another pledge on account of a defect on that first given, as the Roman law does; though an action will lie upon the implied warranty of title. Fraud vitiates all contracts thus,—*Si quis in pignore pro auro æs subjecisset creditori, qualiter tenetur? Si quidem dato auro æs subjecisset, furti tenetur; quod, si in dando æs subjecisset, turpiter fecisse, non furem esse; sed et hic puto pignoratitium judicium locum habere*;⁷ but if there be no fraud imputed, the Roman law says,—*Si sciens creditor accipiat vel alienum, vel obligatum, vel morbosum, contrarium judicium, ei non competit*;⁸ and the common law says, in like manner, *volenti non fit injuria*.

¹ C. 8, 24, 1; Domat. 3, 3, § 6, art. 1-7; Ayliffe, 4, 18, p. 539.

² C. 8, 16, 6; Bell Com. § 412, 4th ed. et p. 485, 5th ed.

³ 1 Stair, Anst. B. 1, t. 7, § 4; Bell, l. c.

⁴ P. 13, 7, 25; 1 Domat. 3, 1, § 3, n. 20; Ayliffe, P. 4, 18, p. 530-1.

⁵ Kemp v. Westbrook, 1 Ves. R. 275; Story, Eq. Jur. § 1031-3.

⁶ P. 13, 7, 6; Poth. P. 20, 5, 16.

⁷ P. 13, 7, 36.

⁸ P. 13, 7, 16.

§ 1495.

According to the Hebrew law, land could not be alienated by mortgage in perpetuum, the original owner or his heirs being reinstated in his or their lands, discharged from all debt, at the next jubilee, which recurred every fifty years. This regulation affected loans; and the price at which the land was redeemable in the interim was, therefore, calculated according to the value of the unexpired term, to such next ensuing quinquagesimal period.

Mortgage of land by the Jewish law.

It is not probable that the Greeks and Romans borrowed the idea from that people, this singular provision not being traceable in any of their laws on the subject; the conception arising more naturally out of the ordinary transactions of life.

The Greeks and Romans did not borrow the idea of mortgage from the Jews.

The Teutonic nations, and consequently the Anglo-Saxons, were, doubtless, in the habit of pledging their lands in their native country or in that of their adoption, as may be clearly inferred even from Tacitus,¹ long before they were acquainted with, or had even engrafted on their own, any part or principle of the Roman law, the details of which were, however, most probably adopted later, both on the continent and in this country, in development of a principle already existent, hence the difference observable subsequently in the two systems may be referred to the period at which the Roman law was introduced among the Saxon race of either country. In England it was more positive, but ceased with the connection with Rome; on the continent, that influence was exercised continuously for a far longer period, and the new regulations of the imperial law were consequently introduced and adopted.

Nor the Teutonic nations from the Romans.

The feudal system in checking alienations of land evidently operated some of the restrictions we find at present, although many have been relaxed by subsequent legislation.²

The feudal system checked mortgages.

§ 1496.

The old common law recognised two sorts of mortgage, *vivum* and *mortuum*,—both, according to Glanville, were determinable or base fees, with a right of reverter in the feoffee or heirs, on payment of a given sum.

Mortgage is either *vivum* or *mortuum*.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another, and grants him an estate, as of 20*l.* per annum, to hold till the rents and profits shall repay the sum so borrowed, wherein it in some measure resembles the *pactum anticbrescos*. This is an estate conditioned to be void as soon as such sum is raised. And in this case the land or pledge is said to be living, if it subsist and survive the debt; and, immediately on the discharge thereof, results back to the borrower.

The *vivum vadium*.

¹ De mor. Ger.

² The first of these was the statute Quia Emptores Terrarum, 18 Ed. I.; the exception.

tion reserved, as to tenants in capite of the Crown, was abolished by 12 Car. II. 24.

§ 1497.

Welsh mortgages resemble the antichretic contract.

The so-called Welsh mortgage bears a remote resemblance to the *vivum vadium*, but exactly corresponds to the *pactum antichreseos*,—the rents and profits being received, as in the latter, in satisfaction of the interest of the loan only; whereas in the former, of the *vivum vadium*, they go in gradual diminution of the principal debt; but the estate is never forfeited in either. It may, therefore, be said that the Welsh mortgage closely resembled the original *mortuum vadium*, of which hereafter.

§ 1498.

The mortuum vadium.

The *mortuum vadium*,¹ or mortgage, ultimately recognised by the common law, was an absolute fee, with a condition annexed, rendering the feoffment void on payment of a given sum, which the common law allowed if reserved to the feoffor or his heirs.

Thus, if a man borrow of another a specific sum (say 200*l.*), and grant him an estate in fee, on condition that if he, the mortgagor, repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, the mortgagor may then re-enter on the estate so granted in pledge.

Difference between the two estates.

The difference between the estates was striking. In the first instance, the creditor took an estate, which, as soon as his debt was satisfied, *ipso facto* ceased, and the feoffor might re-enter and maintain ejectment; in the latter instance, the feoffee took the whole estate subject to be defeated, but which, on the non-fulfilment of a certain engagement, became his own by an indefeasible title. In the first case, the defeasibility was an inherent quality of the estate; in the other case, the determination was collateral to the estate.

Difference between the definitions of Glanville and Littleton.

Littleton and Coke appear to have lost sight of the ancient distinction between the *vivum* and *mortuum vadium*, as also with respect to the origin; for Glanville says,²—*Mortuum vadium dicitur illud cujus fructus vel redditus interim percepti in nullo se acquietant*; viz., a feoffment to the creditor and his heirs until his debtor paid him a given sum, until which time he received the rents without account, whence the estate was, in the mean time, dead and unprofitable to the mortgagor, and the mortgagee's estate was liable to the penalties of usury if he died possessed of the pledge; whereupon Coote remarks, that as, at the time Glanville wrote, land was still fettered, this explanation is more reasonable than the subsequent one of Littleton and Coke, who say, that on the non-fulfilment of the condition by the mortgagor, the estate is for ever *dead* to him.

§ 1499.

Present mode of effecting a mortgage.

At present, the more usual mode of effecting a mortgage is, by a condition that the mortgagee shall reconvey the estate to the mortgagor if the mortgage be in fee, or that the term of years shall cease or be void if the mortgage be for a term only,—in which case,

¹ Coote on Mortg. ch. 2, p. 8.

² Lib. 10; c. 6.

the land which is so put in pledge has, by law, in case of non-payment at the time limited, irrevocably passed from the mortgagor, and the mortgagee's estate in the lands is then no longer conditional, but absolute. But so long as it continues conditional, that is, between the time of lending the money and the time allotted for payment, the mortgagee is called *tenent in mortgage*. But as it was formerly doubtful, whether, by taking such estate in fee, it did not become liable to the wife's dower and other incumbrances of the mortgagee (though that doubt has been long ago overruled by courts of equity), it therefore became usual to grant only a long term of years by way of mortgage, with condition to be void on repayment of the mortgage money; which course has been since pretty generally continued, principally because, on the death of the mortgagee, such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

An unexpired term passes as a chattel interest to the executor.

As soon as the estate is created, the mortgagee may immediately enter on the lands, but is liable to be dispossessed upon performance of the condition, by payment of the mortgage money at the day limited. And, therefore, the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility at law of being afterwards evicted by the mortgagor, to whom the land is now for ever dead.

But here, again, the courts of equity interpose; and, though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at common law, yet they will consider the real value of the tenements compared with the sum borrowed. And they will allow the mortgagor, within any reasonable time less than twenty years from the last distinct acknowledgment of its being a mere mortgage, to recall or redeme his estate, on his paying to the mortgagee his principal, interest, and expenses; for otherwise, in strictness of law, an estate worth 1,000*l.* might be forfeited for non-payment of 100*l.* or of a less sum.

Equitable intervention.

This reasonable advantage, allowed to mortgagors, is called the equity of redemption, borrowed from the civil law, and enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may, if armed with a power of sale, sell the estate in order to get the whole of his money *immediately*, or else, by proceedings in equity, call upon the mortgagor to redeme his estate *presently*, or, in default thereof, to be for ever foreclosed from redeeming the same; that is, lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages, the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not, however, usual for mortgagees to take

Equity of redemption.

The English mortgage resembles the hypotheca.

possession of the mortgaged estate, unless where the security is precarious or small, or unless where the mortgagor neglects even the payment of interest, when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands in the nature of a pledge, the *pignus* of the Roman law; whereas, while it remains in the hands of the mortgagor it rather resembles the *hypotheca*, where the possession of the thing pledged remained with the debtor. But by statute,¹ after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment, but may be compelled to reassign his securities. In Glanville's time, when the universal method of conveyance was by livery of seisin, or corporeal tradition of the lands, no gage or pledge of lands was good, unless possession was also delivered to the creditors; *si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatæ conventiones tueri non solet*: for which the reason given is to prevent subsequent and fraudulent pledges of the same land; *cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari*; and the frauds which have arisen since the abolition of this formality induce the presumption of its utility and soundness.

Pledge of real property only recognised in equity. Equitable mortgage is a pledge of deeds.

The common law does not then in fact recognise a gage of landed property, because the title passes to the mortgagee; but equity does recognise this as a chattel interest.

Similar to a pledge of chattels is the so-termed equitable mortgage, being a deposit of the title-deeds of a real estate² as a security for money lent; in which case the court will default the payment of the interest on a loan so secured, order the sale forthwith of the property represented by such title-deeds, on sufficient evidence being adduced to connect them with the loan.³

§ 1500.

Difference between the Roman law of hypotheca, and the English law of mortgage.

A mortgage, or more properly a gage of chattels, by the common law transfers a *conditional* legal title, which becomes *absolute* at law in the mortgagee on non-redemption at the time stipulated, although equity may permit the mortgagor to redeme.⁴ By the Roman law, an hypothecation is a pledge without possession by the pledgee; and the nearest approach to it in English law is the exceptional case of the holders of bottomry bonds, &c. above alluded to, and the hypothecation of the Scottish law, which give a claim on the ship or other object *in rem*;⁵ for by a hypothek the dominion is not parted with by the debtor, who simply makes a certain object liable to answer, *pro tanto*, for an obligation, and the action is brought to make absolute this *jus in rem* or *in re*; and the creditor has, if it may be so expressed, a lien without possession.

¹ 7 Geo. II. 20.

² Here the deeds represent the estate itself, but the sale of such pledged estate must be judicial.

³ Chapman v. Chapman, coram Master of the Rolls, Lord Langdale, March 1851:

in this case the depositary failed in connecting the deeds with the loan.

⁴ Story, Bail, § 387, § 308-11, *ibique* cit.; et vide eund. Eq. Juris. § 1030-1.

⁵ Story, Bail, § 288.

In Rome, the title of a *bonæ fidei* purchaser prevailed against the creditor in hypothek, which is not so in the case of an English mortgage; the logic of which is obvious, inasmuch as the grant of a Roman hypothek does not transfer the *dominium* or legal title, which that of an English mortgage does.

The Roman and English law agree in allowing the prior creditor in mortgage to have his own debt satisfied before that of a second mortgagee.

§ 1501.

The Mohammedan law recognises no difference between the pledge of goods and the mortgage of land; and possession¹ gives, therefore, in mortgage a preference over time: hence the rule is not *qui prior est in tempore potior est in jure*; but *qui prior est in possessione potior est in jure*. The agreement, indeed, is not binding before possession is given, it is merely a contract to bind. Lands held of the church that are incapable of mortgage:² these in Turkey³ are termed *Wakoof*, in India *Imaum* lands, and are those whereof the Mosk *Madgeed* has the fee. It is a common practice for the original granter, particularly when he has no heirs, to surrender his lands to a Mosk, and receive a new grant on payment of a fine, with a remainder to his nominee; such lands cannot be mortgaged.⁴

By the Mohammedan law, there is no distinction between pawn and mortgage. Priority depends upon possession.

Wakoof or church lands.

Bay-bil-wafâ is a conditional sale, with an equity of redemption within a given time: if the time be short, as three or four days, it is a conditional sale; if for a long period, it is to be considered a collateral security for money lent,—that is to say, a mortgage⁵ in the English sense, for the title passes by the deed *sub conditione*.

Bay-bil-wafâ conditional sale or mortgage.

The *Bay-bil-wafâ* must be made to the lender, not to the person through whom the loan was negotiated; and the mortgagee's consent is required for alienation by the proprietor,—that is, to destroy the equity of redemption, and so to render the title absolute.

The wife of a banished Mohammedan may enforce the equity of redemption so long as she remains the wife of such banished husband, where the bond is conditioned for such equity of redemption, on a certain notice being given.⁶ And an heir may enforce his equity of redemption as to mortgaged lands, to the amount of his share of the inheritance.⁷

Wife of a banished man has the equity of redemption; so also an heir.

The *jura remum*, inclusive of the *jus possessionis* and the *jus pignoris*, being now brought to a conclusion, we pass to the *jura in personam*, or personal rights, whereby a person is bound to give or to do something to or for another.

¹ Morley's Analyt. Digest of Reported Cases in India, vol. i. p. 455, § 128, n. 1. This useful and learned work is the first attempt that has been made to digest the reported cases of native law in India. For cases, see this work.

² Id. § 29.

³ For a full treatise on Mohammedan law of Turkey, vide D'Ohsson's work in French; there is, however, an English translation.

⁴ FK.

⁵ Id. § 33.

⁶ Id. § 31.

⁷ Id. § 34.

TITLE XVIII.

The general adoption of the Roman Law of Contracts—Contracts in general—Natural—Civil—Prætorian—Mist—Immediate—Mediate—Ex Delicto—Quasi ex Delicto—Pactio—Conventio—Pactum—Obligatorium—Liberatorium—Remissorium—Conventio Onerosa—Beneficii Contractuum Essentialia—Naturalia—Accidentalia—Requisites of a valid Contract—Consent—Parties—Intention—Mutuality—Manner and Form—Conditions—Operation—Arrha—Contractus or Pactum—Quasi Contracts—Nominate and Innominate Contracts—Unilateral and Bilateral—Damnum—Mora—Culpa—Casus.

§ 1502.

The Roman law of contract has been more generally adopted than any other ;

THE Law of Contract, or as it is generately termed the Law of Obligation, is that part of the Roman legal complex which has preserved its integrity in the jurisprudence of all nations with less change than any other ; and while we are often able to trace in the jurisprudence of modern nations the basis only, and that indeed with considerable difficulty, we may, as a general rule, confidently appeal to the Roman law as furnishing the norm, and rely with confidence upon its decision in doubtful cases.

on account of it being more abstract and purely logical.

The reason of this remarkable difference must be sought in the fact of the law of personal obligations being less affected than any other parts of a legal system by forms of administration ; for the Roman law of contracts does not directly result from any of the forms long lost and forgotten—of *patria potestas*, *civitas*, or the like—it subsists between persons, who of necessity are politically equal. In its nature it is more abstract than other branches of law, and its construction is unavoidably on a basis purely logical, with a view to its generalization among all nations of the habitable globe, to which the far-extended commerce of ancient Rome and of the more modern Byzantium extended.

A system framed with such care, matured by such experience, and administered with such integrity, could not fail to attain a high degree of perfection ; so that, combined with the great political and strategical power of the Roman state, it found ready adoption by nations which feared its power, sought its alliance, or were dependent upon its commerce. So deeply indeed had the Roman law of obligations taken root, that the wild Mussulman Arabs and Othmans adopted it as an equitable system already acknowledged by the nations they had overrun, and suitable to supply a gap in their own imperfect code of jurisprudence ; while they rejected many other parts of the Roman system as incompatible with their errant

mode of life, their newly-established religion, their ignorance, or their means of administration. For these reasons, a greater proportion of the Roman law generally has been retained in the West, where civilization has progressed, than in the East, whence it has receded. And for the same reason, while that portion which rules the reciprocal claims between men has indured with more integrity than others in the East, so it has become still further developed in the West, through the improvements in international communication, in governments guaranteeing a more perfect security for individual property, and in the inventions and refinements of a highly civilized age.

§ 1503.

The word obligation, in its most extended sense, signifies the binding of one man to another,—the bond by which two persons are bound together. Here *ob*, in composition, is synonymous with *circum*,¹ which gives us the true meaning of *obligate*,—to bind around, about,—to unite in one bond; hence it is often explained by *vinculum à vincere*.

Origin and derivation of the word obligation.

Civilians have adopted two grand divisions of obligations into *mere naturales*, *mere civiles*, the *mixtæ* partaking of both,—whereof the *mere civiles* and *mixtæ* may be *mixtæ civiles* or *mixtæ prætoriæ*; it is more convenient to reject the subdivision of *naturales* into *perfectæ* and *imperfectæ*, and to term them *mere naturales* without any further subdivision; and the two latter, *civiles perfectæ* and *imperfectæ*. A natural obligation is the result of mere natural equity;² by which, says Wood, “Kings are bound to one another, and to their subjects.” *Is natura debet quem jure gentium dare oportet cujus fidem secuti sumus.*³ *Quibus naturâ debeatur, ii non sunt loco creditorum.*⁴ Wood, then, misunderstanding Ulpian, proceeds to divide natural obligations into effectual and ineffectual, which Halifax, following Wood or others, terms *perfect* and *imperfect*; as, however, these distinctions, as put, are calculated to mislead, being reducible to another rule, they are consigned to a note.⁵ In fact, a natural,

Civilian division into natural, civil and mixt.

Erroneous view of Wood and Halifax.

¹ Facciolatis Forcellini. ² P. 46, 3, 95, § 4. ³ P. 50, 17, 84, § 1. ⁴ P. 50, 16, 10.

⁵ A natural obligation is effectual or ineffectual:—

“*Effectual*, P. 2, 14, 7, § 1, which is not sufficient to form a ground of action by the Roman law, yet it may bar by way of plea or exception; wherefore, if one is paid a sum by mistake, which was only due in conscience, it shall not be recalled if that claim be pleaded, P. 12, 6, 26, § 12. Sureties or covenants may be made for the performances of such obligations, l. 3, 21, § 1, as upon a naked promise, without cause or consideration. Stoppage, P. 16, 2, 6, of payment or compensation to an action may arise from it, and may be pleaded. It may be changed and transferred, P. 46, 2, 1, into a civil obligation of another species.”

“*Ineffectual*, which has no assistance from any positive law, but consists merely in the pleasure and conscience of the party. As the obligation of gratitude, P. 5, 3, 25, § 11, to return gifts for gifts; to pay the whole legacy to every one, when by the law *Falcidia* the heir may deduct a fourth part. An obligation not to take advantage of a will, P. 26, 2, § 5, § 15, which wants some formal solemnities to the perfection of it. An obligation to be merciful or liberal, P. 40, 7, 38. These may bind if the person pleases; but such actions cannot be forced on him. And the reason of this policy, which denies actions to some natural obligations, or any assistance at all (even so much by exceptions) to others,

which is synonymous with a moral obligation, is taken out of that category on becoming a civil one, and as such inforcible at law; and this rule will be found applicable to all the cases cited by Wood, but not to a natural obligation, which has *no force at all per se*, till adopted in a fuller or less full degree by the civil law.

Obligatio mere civilis.

Thus, then, an obligation is *mere naturalis*, purely natural, or *mere civilis*, founded purely on a civil law; if compounded of both, it is termed *mixta*. These three obligations may be illustrated as follows:—A debt contracted by a *filius familias* would be a natural obligation, for he cannot be called upon to discharge it, and is therefore *mere naturalis*. But a thief, condemned to pay *double*, or *quadruple* in certain cases, the value of the thing stolen, is so punished by the civil law merely, for natural equity would only require the return of the thing stolen, or its value; this is therefore *mere civilis*. A farmer is under an obligation, natural as well as civil, to pay his rent, for here both the natural and civil obligations coincide; hence such obligation is termed *mixta*,¹—though, to speak more correctly, it is purely a civil obligation, for without the civility of the obligation, the farmer could not be forced to pay, though morally bound to do so.

Obligatio mixta.

The civil law, then, either destroys a natural obligation, or it partially coincides with it, allowing it some consideration; or it coincides with, and confirms it absolutely.

§ 1504.

Simple natural obligations are simplex in their nature.

Simple natural obligations, then, are either wholly extinguished by the civil law, or only not confirmed.

The first have no legal effect, and produce no action;—as, for instance, in the case of security given by a woman, the contracts of minors, prodigals, or such as compromise out of court on account of aliment due by testament² and gambling debts.

The second, though not extinguished, are still not confirmed;—as, for example, the obligation arising out of a *nudum pactum*³ (between which and contracts, natural law makes no distinction); the obligation of a *filius familias* to repay a loan; that between master or slave, or father and son;⁴ the right of a *pupillus* near puberty, or a minor near majority, to make dispositions with respect to his property without his tutors' or curators' co-operation.⁵ The advantage of this distinction is more clearly perceptible in the law of pledges, in which an obligation, not confirmed, admits of a

¹ "is, because it lessens the occasions of suits and the power of judges over the fortunes of men; and because it is an incitement to virtue, by leaving some things merely to the integrity of the people, for which there would be but little room, if mankind acted in obedience to positive laws." This is a naïf argument on the part of Dr. Wood.

² I. A. Frommham diss. de obl. ; Ant. Schulting, de nat. ob. in com. acad. vol. i. diss. 1.

³ P. 2, 15, 8, pr. ; C. 2, 4, 8 ; for these rest on a basis purely civil.

⁴ Struben, rechtl. Bed. Th. 4, p. 354 ; Schulting, diss. l. c. cap. 5 ; Ex nudo pacto non oritur actio.

⁵ Id. c. 8 & 9.

⁶ Id. c. 10.

valid pledge being given ; also in the case of security, and when a sum erroneously believed to be due has been paid on an obligation utterly void, the action termed *condictio indebiti* will lie for its recovery,—not so, on an unconfirmed obligation ; and so with compensation, if the debt arise on one side out of a recognised obligation, and the set-off out of an unconfirmed one, the sums may be set off against each other,—not so, if the set-off arise out of an obligation utterly extinguished.

Lastly, the civil obligation may coincide with and confirm the natural one in giving the owner of land, upon which a beast has done damage, power to destrain that beast for the amount of damage so done.

These three cases, then, may be summed up thus,—the civil obligation destroys the individual natural one when such a course is rendered necessary by a general rule of public justice, always traceable to a general equitable principle, which it partially acknowledges, by allowing an act to be proved, which, if it had been done according to legal form, would have given the obligation full civil force ; but which, from a principle of equity, it allows also to be proved in bar of proceedings : or, the civil obligation coinciding with the natural one, the law adopts it, and gives it full legal force by turning it into a civil obligation.

§ 1505.

A civil obligation is that which, founded on natural equity, has acquired operative force from the civil law, and is executory in *foro civili* ; while the other is merely so, *foro conscientiae*, and is hence defined thus :—*Obligatio est juris vinculum quo necessitate adstringimur alicujus rei solvendæ secundum nostræ civitatis jura* :¹ *Obligationum substantia non in eo consistit ut aliquod corpus nostrum aut servitutem nostram faciat sed ut alium nobis obstringat, ad dandum aliquid, vel faciendum vel præstandum*.² The term *vinculum juris* does not apply to other than civil obligations ; the obligation of the latter definition admits of a wider interpretation, and may, perhaps, be more correctly termed an *æquitatis vinculum*.

If a person have a real right, or *jus in re*, to anything, the possessor thereof is, nevertheless, under obligation to do, or abstain from doing, or suffer to be done, something ; this, however, is no obligation within the Roman meaning of the expression, because, not imposed upon a certain person, for an obligation attaches to a *person*, not to a *thing*,—thus, *agit unusquisque aut cum eo, qui ei obligatus est, aut cum eo agit qui nullo jure ei obligatus est, quo casu proditæ actiones in rem sunt* ;³ and hence the axiom *obligatio personam non egreditur*, thus an obligation gives no action against a third party, as an *actio vindicationis rei* lies against every possessor.

¹ I. 3, 14, pr.
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² P. 44, 7, 3, pr.

³ I. 4, 6, § 1.
3 K

§ 1506.

Simple civil obligations are in their nature duplex,—effectual or ineffectual.

A simple civil obligation is also double—effectual or ineffectual : effectual in the case of the denial to deliver up a *depositum miserabile*, in answer of which there is no good plea ; the same in the case of double, triple, or quadruple damages, judicial sentence to pay a sum of money, or a promissory note upon which, in fact, nothing has been received.

A civil obligation will be rendered ineffectual by plea, as in case of force or fear having been used to obtain it, by the *exceptio metus*, or by the *exceptio pacti*, when a debt on a contract having been informally remitted is afterwards claimed ; or, in the case of a solemn promise for a limited time, the promissor can be sued after the expiry of such period, but may plead the *exceptio doli* or *pacti*. Consequently, effectual civil obligations are those in which no plea will avail ; ineffectual, such as may be successfully met by some plea.

§ 1507.

Mixed obligations are also duplex, civil and prætorian.

Mixed obligations are divided into civil and prætorian : the former owing their origin to the civil law, the latter to the prætorian edict ; of which latter description is the obligation arising out of a contract of hypothecation which the prætor transplanted into, and made a part of the civil law by his edict, it being before but a natural obligation. The same is the case with a contract arising *ex constituto*, in which the prætor gave an action on a *pactum nudum* ; but the obligation arising out of a contract of sale or exchange is civil and perfect, and the natural law here has been transplanted into the civil law by another and more formal way.

§ 1508.

Immediate obligations.

Every obligation is founded on a law, but that called *immediata* is more particularly so, because it can be straightway referred thereto ; as in the case of a person believing himself to have a just claim to property possessed by another, and having the intention to prove his title, calls upon such possessor, *ad exhibendum*,¹ to exhibit it, that he may be assured as to the identity thereof previous to vindicating it.

Mediate are duplex in their nature.

The *obligatio mediata* is likewise founded on a law, but mediately only, it being first referable to a contract ; of which kind is the obligation of a purchaser to pay the price agreed, which being a *lawful* transaction, the obligation is said to arise *ex conventionione*, that is, out of a contract ; for no one sells without the implied understanding of a *quid pro quo*, or a quasi contract, as the obligation of a thief to indemnify the party robbed : such obligations

¹ Höpfner, § 1100, by the Lex Rhodia de Jactu, if a ship be saved by throwing overboard goods, the owners of the goods

saved are answerable to him whose goods were thrown overboard.

are said to arise *ex delicto sive maleficio, sive ex quasi delicto*, which is the obligation arising from an unlawful transaction. Caius¹ thus expresses the differences,—*Obligatio nascitur aut ex contractu aut ex maleficio aut proprio quodam jure ex variis causam figuris*. Where the illegal act is committed accidentally, and not designedly, such *delictum* is termed *quasi*, as devoid of *malus animus*; hence the quasi contract and quasi delict are supposed to be the meaning of Caius's expression.

Obligations ex delicto, and quasi ex delicto.

It now remains to consider what a contract is in its extended sense. A contract, then, is the declared consent of two or more persons in respect of some legal relation which concerns them, or, in other words, it is an accepted promise: thus, neither a will, a promise to the commonweal,² nor a vow to God,³ *Pactio est duorum pluriumve in idem placitum consensus*.⁴ The word *conventio* is also one of general signification, thus,—*Conventionis verbum generale est, ad omnia pertinens, de quibus negotii contrahendi transigendique causâ consentiunt, qui inter se agunt. Nam sicuti convenire dicuntur, qui ex diversis locis in unum colliguntur, et veniunt, ita et qui ex diversis animi motibus in unum consentiunt, id est, in unam sententiam decurrunt. Actio autem conventionis nomen generale est, ut eleganter dicat Pedius, nullum esse contractum, nullum obligationem, quæ non habeat in se conventionem, sive re, sive verbis fiat*.⁵ We now come to the expression *pactum*, which is *duorum consensus atque conventio*.⁶

Contracts lato sensu.

Pactio.

Conventio.

Pactum.

§ 1509.

Pactum obligatorium is that by which the promissor becomes for the first time bound to do a certain thing; but *pactum liberatorium*, that by which he is absolved from an obligation already existing, and is otherwise termed *remissorium*, or *de non petendo*. The title of the Pandects, *de pactio*, refers almost exclusively to this latter sort.

Pactum obligatorium, liberatorium, or remissorium.

Again, *conventiones* are *onerosæ* or *beneficiæ*, onerous, when both parties mutually promise what may be beneficial to them both.

Conventio onerosa and beneficia.

Beneficial, when the one party promises somewhat advantageous, for which the other gives nothing to the first party, but has to do some service; of which description is the *commodatum depositum*, loan without interest; *mandatum*, suretyship and expromission: the two may also be compounded.

Contracts, too, have their *essentialia*, their *naturalia*, and their *accidentalialia*. The first are such as cannot be dispensed with,—for example, wares and price in money in a sale; *naturalia* will be that the seller shall give up the thing bought: these two Papinian terms *adminicula*.⁷ *Accidentalialia* will relate to paying, for instance,

Contractuum essentialia, naturalia, accidentalialia.

¹ P. 44, 7, 1, pr.

² P. 30, 12, 3, in f.

³ P. 50, 12, 3, § 10.

⁴ P. 2, 14, 1, § 1.

⁵ Ulp. Fr. 1, § 2 & 3; P. 2, 14.

⁶ Ulp. Fr. 3, pr.; P. 50, 12.

⁷ P. 18, 1, 72.

in a particular coin, or may have reference to time or place, and have obtained this term because they must be pre-arranged.

§ 1510.

Essentials of a valid contract.

A contract requires certain conditions to its validity, and—

Firstly, Free and intentional consent.

Secondly, Two parties at least.

Thirdly, Intention as to object.

Fourthly, Mutuality.

Fifthly, Intention as to manner and form.

Which may be summed up thus :—

Consent is the soul of a contract.

Constituitur contractus, consensu duorum ad minus partium in mutuum commodum voluntarie contrahentium secundum pactum formam. Intentional consent is the soul of a contract, which implies two parties at least, who contract with intent to secure, under peculiar specified conditions, to themselves certain mutual advantages not otherwise obtainable.

§ 1511.

The consent.

As the consent must be *free* and *intentional*, certain persons are naturally excluded from the advantages or obligations arising out of contracts,—such as children under seven, imbecile persons, and sots.

Certain persons are incapable of consent,

The second class, although not bound or obliged themselves, bind those with whom they contract; such are *impuberes*, above seven, who contract without consent of their tutors.

D'Arnaud¹ has collated the different opinions as to how far the Romans admitted an infant, and if under any circumstances, to be capable of a natural obligation without intervention of his tutor. To these the curious student may refer, also to those passages of the Pandects cited at the foot,² and endeavor to make them agree.

D'Arnaud gives in substance the following exposition :—"If no regard be had to civil laws, but simply to equity, it is clear that a minor would be responsible. But suppose such minor to live in a community governed by civil laws, by which persons at his age are positively incapacitated from legal acts, then can he do any legal act without the concurrence of his guardian? In cases where the obligation does not depend on the consent of the debtor, *ubi ex re actio venit*,³ the pupill can be made fully liable without his tutor's authority; as, for instance, where any one shall have incurred certain expenses in the business of the pupill whereby he is advantaged. But, on the other hand, should the obligation be dependent on the consent of the guardian, and is a natural one,—that is, one merely in *foro conscientiae*,—and will depend upon whether the want of freedom and ripe consideration which the laws have adopted as

¹ Lib. 2, var. conj. c. 22; Cuj. lib. 14, 1, § 1; P. 46, 3, 44; P. 35, 2, 21; P. obs. 4-36, 1, 64; P. 50, 17, 5.

² P. 12, 6, 41; P. 44, 7, 59; P. 46, 2,

³ Paulus, P. 44, 7, 46.

a norm were in fact exercised in the particular case. But if the question be as to whether the laws have acknowledged such natural obligation, the answer must be negative as to the liability, if the real question be whether the pupill ought or ought not to recognise the transaction."¹

It would seem to be denied that an infant is even bound by a natural obligation, the general rule of law on this subject being that infants and minors are not bound by anything whereby their condition or position becomes less advantageous than before; and should such result take place, they have a claim to be restored to their former condition. This rule is, however, not operative against them, should their position have been improved.

by reason of
infancy.

The *impubes* is, therefore, free from any action, and can claim the return of anything which he has given, if he have already fulfilled his promise, that is, in so far as it may be injurious to himself. With respect to third persons this obligation has its operation,—thus, if any one becomes surety for such obligation, he is compellable to payment; and this extends to the heirs of the *impubes*, in that the surety has no *condictio indebiti*, though he have actually paid the debt.² Moreover, the creditor who shall have accepted a pupillus as his expromissor or surety, is estopped from bringing his action against the principal debtor.³ But the debt of a pupill admits novation.⁴

Where, however, the contract is not injurious to the *impubes*, but, on the contrary, he has thereby become richer, an action lies against him.⁵

The nature of the obligation arising out of the contracts of *minors* has been much disputed; two points may be decided as follows:—

Firstly, A *minor* can enter into binding contracts if he have not a curator.⁶

Competency of
minors to obli-
gate themselves
and property.

Secondly, he cannot sell or hypothekate his real property, whether he have a curator or not, without a permission from the ruling authority.⁷

We find four several conflicting opinions as to cases which come within neither of these rules, all differing from each other, which are as follow, that—

1. A *minor* is bound by his contracts, except when he sells a part of his property; in which case only is the consent of his curator required.⁸

2. A *minor* who has a curator is bound by no contract without his consent, except as to marriage and promise of marriage; for this is a simple conjunction of persons within the immediate

¹ I. 3, 19, § 9 & 10.

² P. 45, 1, 127; P. 36, 1, 64, pr. p. 95, § 2.

³ I. 3, 29, § 3.

⁴ P. 46, 3, 95, § 2; P. 46, 2, 1, § 1.

⁵ P. 26, 8, 5, pr.; P. 13, 6, 3, pr.

⁶ C. 2, 22, 3.

⁷ C. 5, 71, 16.

⁸ Cujac. D. 45, 1, 201, et in obs. lib. 19, c. 33; Fachin, contr. lib. 3, c. 9; Bronchorst, enantioph. cent. 1, assert. 33; Vultejus, in discep. scit. c. 16, p. m. 191; Hilliger, ad Don. lib. 12, c. 22.

power of the contrahent, and does not consist in giving or doing, or in matters as between debtor and creditor.¹

3. A *minor* can be bound by his contracts; but if they regard his property, and have been concluded without his curator's authority, he cannot be sued during the time he is under *curatela*; but on attaining full age he may be sued to perform them, if he do not obtain a *restitutio*.³

4. A contract which concerns the *person* of the minor is binding; that which concerns his property is not.³

In support of this last and most reasonable opinion as to the *person* of the minor, Paulus⁴ says,—*puberes sine curatoribus suis possunt ex stipulatu obligari* as far as the important contract of marriage is concerned, *ad officium curatoris administratio pupillæ pertinet nubere autem suo arbitrio potest*,⁵ and no law is to be found to support the contrary opinion;⁶ and now the question of the minor's property is clearly decided by the following decree of Diocletian and Maximian:⁷—*Si curatorem habens minor quinque et viginti annis post pupillarem ætatem res vendidisti, hunc contractum servari non oportet: cum non absimilis ei habeatur minor curatorem habens, cui a prætore curatore dato bonis interdictum est* (this refers to a prodigal).⁸ *Si vero sine curatore constitutus contractum fecisti: implorare in integrum restitutionem, si nec dum tempora præfinita excesserint, causâ cognitâ non prohiberis*.⁹

Incapacity by reason of physical defect. Of error in nature, person, or object.

Deaf and dumb persons may contract if they understand what they are about, and can clearly express themselves.

As consent is the soul of a contract, so it is void if founded on *fraud*, which is to be judged by the event as well as by the design,¹⁰ or when there be an error in the *nature* of the contract, or in the *person*,¹¹ or in the *object*, or the *attributes* impliedly or expressly attaching to it.¹² For *in omnibus negotiis, sive bonæ fidei sint, sive non sint, si error aliquis intervenit, ut aliud sentias (puta), qui emit, aut qui conducit; aliud qui cum his contrahit, nihil valet, quod actum sit. Et idem in societate quoque coeundâ respondendum est, ut si dissentiant, aliud alio existimante, nihil valet ea societas, quæ in consensu constituit*.

Hence, if the error be in the *nature* of the contract—that is, if one intended only to hire, the other to sell; or in the *person*, as if

¹ Donell, ad D. 45, 1, 101; Vinn. de pact. c. 14, n. 13; Noodt, ibid. c. 20; Gæddæus, de contr. step. c. 7, conclus. 14; Lyclama, mem. 6, lib. 7, 2, ch. 15; Hunn, resol. lib. 1, tract. 4, qu. 22.

² Huber, prælud. ad inst. lib. 3, 20, 4; Zach. Huber, diss. lib. 3, diss. 5, c. 1, § 16, p. m. 507; Marckart, interp. recep. jur. civ. lect. c. 22-4.

³ Voet. ad Pand. 4, 4, 14; Weber nat. Verbind. § 72.

⁴ P. 45, 1, 101.

⁵ P. 23, 2, 20.

⁶ Marckart, l. c. p. 146.

⁷ C. 2, 22, 3.

⁸ P. 45, 1, 6.

⁹ Vultell, discept. schol. l. c.; Marckart, l. c. 150, seq.

¹⁰ P. 50, 17, 79. A man applied for saviour to a chymist, who, suspecting his object to be to procure abortion, gave him bread pills, which were administered. *Quære, Is the animus alone sufficient to constitute the offence in this case?*

¹¹ P. 44, 7, 57; P. 50, 17, 116, § 2.

¹² P. 18, 1, 9; P. 45, 1, 22.

one intended to contract with A, and, in fact, contracted with B, and A appears after the bargain is concluded,—but here, of course, some interested motive is supposed in A; lastly, as to the *object*, as if a vendor have two houses, and contracts to sell the first, while the purchaser thinks he has bargained for the second.¹

There are other cases which do not render a contract void, but give rise to a claim of indemnity in some shape or other. In the case of an onerous contract, if the object have a secret defect making it utterly useless, an *actio redhibitoria* will lie for return of the thing on one, and the value on the other side,—in short, a *restitutio in integrum*; but if the defect be such as only *diminishes* its worth, then the *actio quanti minoris*, or *æstimatoria* lies, to assess such deficiency, for the Roman law implies a warranty;² and it is curious that in this action the court may give judgment, as in a case of *redhibitoria*,³—that is, give the plaintiff more than he went for.

Excepted cases giving claim to indemnity.

§ 1512.

The consent must be *freely* given, for if it have been unduly influenced in any way, the prætor will grant a *restitutio in integrum* for *ait prætor; pacta conventa, quæ neque dolo malo, neque adversus leges, plebiscita, senatus consulta, edicta principum, neque quo fraus cui eorum fiat, facta erunt servabo*;⁴ but not only *fraus* and *dolus malus*, which indeed vitiates all contracts, but also force and fear, as militating against a free consent, have the effect of voiding a contract,—for *nihil consensui tam contrarium est, qui ac bonæ fidei judicia sustinet, quam vis atque metus, quem comprobare, contra bonos mores est*;⁵ likewise error, *quia non videntur, qui errant, consentire*.⁶ Nevertheless, this vice is purged if the obligee expressly or tacitly accept the contract after such violence has ceased, or has allowed the limitation of restitution, ten years, to elapse,⁷—for the contract is naturally held valid until some cause be assigned, before a competent tribunal, wherefore it should not be so. But a contract obtained through violence by a person not interested, whereby a third party benefits, is valid.⁸

Consent must be free.

Secondly, A contract must be *sincere*, or, in other words, *bonæ fidei*; hence a simulated contract is of none effect. A simulated contract is one whereby two parties contract to all outward appearance, but without the real intention of binding themselves; such contracts are, for the most part, doubly void, since they usually have for object, the deception of some third party; hence

Sincerity.

¹ P. 18, 1, 9, in f.; P. 45, 1, 22.

² Hammel, rhaps. quæst. obs. 684; Glück. Pand. § 297; Thibaut, Theorie II. 4.

³ P. 21, 1, 43, § 6; P. 44, 2, 25, § 1; vide et P. 21, 1; Feuerbach, civ. Vertr. 1 Th. n. 2 Thib. P. R. § 190.

⁴ Ulp. Fr. 7, § 7; P. 50, 12.

⁵ P. 45, 1.

⁶ P. 50, 17, pr. & § 2. All these may be discussed as questions of moral philosophy, viz. an cum latrone vel prædone fides servanda est.

⁷ Poth. Oblig. T. 1, c. 1, § 2.

⁸ P. 4, 2, 9, § 1; Poth. l. c.

a simulated contract, if not really intended to be concluded, is void ; but a contract simulated of sale, but really one of gift, would be good, for this is termed *contractus interne gestus*, not a simulated one properly so-called ; neither can he, who is persuaded he has a right, be guilty of deceit, though he may be of mistake.¹

Mutuality.

Thirdly, The consent must be *mutual* ; hence simple treaties are not contracts, and remain inchoate until they are, by mutuality of intention, converted into contracts, &c.,—hence the term “being in treaty for,” &c. ; nor will it suffice that the two parties in treaty agree in the same thing at different times, as if one agree to-day and disagree to-morrow, and the other disagree to-day and agree to-morrow. Hence, also, a pollicitation is no contract, but merely a one-sided promise, or a promise then not already accepted, and gives on this account no action, except when God, the Church, or some pious foundation is the object of it, for then it is termed a vow, or *votum*, for *si quis rem aliquam voverit, voto obligatur* ;² for the Church assumes a general procurator to accept on such accounts whatsoever superstitious and weak persons, and those whose minds have become impaired by distress and anxiety, can be entrapped into devoting to religious purposes, whereby its members enjoy the usufruct, without much caring in whom the legal estate vests. But the canon law goes still further, and grants an action on a *votum reale*, or vow, to give a third person something if a certain event come to pass ; as, for instance, by one to endow a monastery, if his wife should be delivered of a son. But such pollicitation, if made to the State, must have a good and sufficient ground ; thus, if an alderman promise to repair the city pavement, if he become mayor in the ensuing year, it suffices.

Intention.

Fourthly, The consent must be clear and *definite*, demonstrative of intention ; though in case of dower, the judge may afterwards assess the amount thereof.³

Certainty.

Consent verbal,
actual, tacit.

Fifthly, The contract must be *certain*, either by express declaration or tacit understanding ; this consent may be expressed by *word* or *deed*, or neither, that is tacitly understood ; either the consent may be by express words, or some act tantamount thereto, as nodding, and the like. Tacit consent is by using either words or acts termed *facta concludentia*, whence such consent may be implied—the returning a promissory note⁴ to the debtor would be of this nature, or speaking of the debt he owes, as already cancelled. *Consensus presumptus*, or presumed consent, is where it is presumed consent would be given if the party were present, on account of the advantageousness of the transaction ; consequently, as is the degree of certainty or probability, so the presumed *consensus* is termed *certus* or *probabilis*.

When the consent is expressly given, the contract is termed *pactum expressum* ; but when otherwise, *pactum tacitum*.

¹ P. 50, 17, 177, § 1.

² P. 50, 12.

³ P. 23, 3, 69, § 4 ; C. 5, 11, 3.

⁴ P. 2, 14, 2, § 1 ; P. 34, 3, § 1 ;
P. 32 (3), 59.

§ 1513.

As a contract supposes more than one *person*, a father cannot contract with his *filius familias*, for they are but one and the same person in the eye of the law; exceptions have been seen, however, to exist with regard to the *peculium castrense*, *quasi castrense*; but it is doubted whether the *peculium adventitium* form an exception.¹ The same rule applies to the *filius familias* contracting together; this is, however, one of the seven² *leges damnatae*, which bears many constructions. Slaves, as not being persons, cannot contract for themselves, but only as agents for their masters,—hence a contract made during slavery is not valid after manumission.³

The contract requires two parties.

§ 1514.

Inasmuch as none can transfer a right to another but the possessor, who must, moreover, have the free disposition of his property, so the object must be *in commercio*,⁴ being neither a *res sacra*, *religiosa*, nor *publica*; but if the object of the contract perish in the interim, its value is due, if the possessor of it, who made the contract, be in fault. There must also be a possibility, for *impossibilium nulla obligatio est*.⁵

Free power of disposition of property.

Contracts cannot be concerning things which belong to other than to the contrahent:⁶ if a thing be pawned that belongs to another it must be delivered up, nor will the plea that it belongs to another avail;⁷ neither can a man contract for acts not depending on himself. A man may, however, contract to do his *best endeavor* that A do such an act, or promise to *bring it about*⁸ that A do something, but this is a point upon which there is much difference of opinion; a positive promise that A *shall do* something for another is decidedly void.

Promises for another are void.

Probably both are utterly void, on the passage of Ulpian,⁹ *nemo factum alienum promittendū obligatur*, supported by that of the Institutes;¹⁰ and this is perfectly distinguishable from suretyship,¹¹ which is promising in the alternative to pay, *if* another do *not*.

No obligation arises from a contract to do an unlawful act,¹² or one against good manners: Ulpian calls such, *pactum a jure communi remotum*, and Papinian¹³ says, *jus publicum privatorum pactis mutari non potest*,—hence inheritance agreements, *pacta successoria*,

¹ P. 12, 6, 38; P. 41, 2, 14, & 43.

² P. 12, 6, 38; P. 44, 7, 14, & 43; Vinn. ad I. 3, 20, § 6.

³ P. 3, 5, 17; C. 4, 14, 1, & 2.

⁴ P. 50, 17, 45, § 1; C. 12, 63, 3.

⁵ P. 50, 17, 185; P. 50, 17, 135; P. 50, 17, 182, & 8.

⁶ P. 50, 17, 165.

⁷ P. 45, 1, 69, & 103.

⁸ Pro Cuj. ad D. 45, 1, 38, pr.; Vinn. ad I. 3, 20, 3; Leyser, sp. 521, m. 10;

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Pufendorf, animad. 61, § 4; contra, Bachov. ad Treutler, diss. 27, § 2, lib. G. H.; Faber ad Cod. lib. 5, tit. 26, def. 10; Franzk ad Inst. d. § 3, n. 8.

⁹ P. 45, 1, 38; FK.

¹⁰ I. 3, 20, 3; Vinn. ad 5, ejus.

¹¹ P. 45, 1, 38, § 24, & 81; P. 13, 5, 14, § 2; P. 46, 8, 18.

¹² P. 50, 17, 134, § 1; P. 2, 14, 17,

§ 16.

¹³ P. 2, 14, 38.

Pacta successoria void.

Affirmativa.

Conservativa.
Restitutiva.

Negativa.
Renunciativa.

Dispositiva.

Pactum successorium dispositivum.

concerning succession to persons then alive, or any compact which has for its object to make one person the heir of another, is void; under which arrogation is, however, not included. These *pacta successoria* were:—*affirmativa*, when relating to the estate which may be left by one of the contracting parties when he makes over a right,—such affirmative contracts are also termed *adquisitiva*, whereby a right is acquired which formerly was not possessed, as would occur in the case of step-children; *conservativa*, whereby a right in fact forfeited is retained; *restitutiva*, whereby it is agreed to return or restore to another an inheritance which may come to the contrahent by some means or other, or indeed to leave his own property after death to one who was not a co-contracting party; the *pacta successoria* may be also *negativa* or *renunciativa*, being the agreement to forego a claim on an inheritance which hereafter will accrue to the contrahent.

Adquisitive, conservative, restitutive, and renunciative¹ compacts were void *in toto* by the rules of Roman law; with respect to dispositive, they are valid when they have regard to the property of an uncertain party,² but void if relating to that of a certain party, save such party consented thereto; there is, however, nothing to prevent the recall of such consent, and the rendering the compact thus null,³ these contracts are termed variously *adquisitiva*,⁴ when I obtain something new; *conservativa*, whereby I recover a forfeited right of heritage; or *restitutiva*, when I agree to return what has been obtained *ab intestato*⁵ or otherwise, or to leave own property to a third party, who was no co-contrahent. *Negativa* or *renunciativa*⁶ are those by which a future heritage is renounced; all these are invalid.

With respect to the heritage of a third party, it is termed *pactum successorium dispositivum*, as when I sell my uncle's inheritance during his life, to which he agrees; the contract is valid, but he may at any time render it invalid, by making his will in favor of another.⁷

The reason the Romans held these compacts to be invalid was, first, that he who knew he was to succede to an inheritance might be induced to attempt the life of the testator; secondly, because such compacts injured the interests of the intestate heirs,⁸ who had the first *legal* right in default of a testament. German lawyers are divided in opinion as to whether the Roman law is or is not binding in such cases in those states of Germany where the Roman law prevails; the majority, however, hold them to be obligatory.⁹

¹ C. 2, 3, 15, 19, ult.; C. 8, 39, 4; C. 5, 14, 5, Puf. obs. S. I. 209, III. 116; Hebestreit, diss. vind. veri val. pact. succ. tam jur. Rom. quam Germ. Erst. 1768, c. 3, § 20, seq.

² Boehmer, diss. de fund. pact. fam. ad fideicom. incl. c. 1; Ex ad Pand. t. 2, 403; Hebestreit, l. c. § 28, seq.

³ C. 6, 20, 3; P. 38, 16, f.

⁴ C. 2, 3, 15, & 19, ult.; C. 8, 39, 4; P. 5, 14, 5.

⁵ Boehmer, diss. de fundam. pact. fam. ad fideicom. incl. c. 1; Ex ad Pand. tem. 2, p. 403.

⁶ P. 38, 16, 16; C. 6, 20, 3.

⁷ C. 2, 3, 30.

⁸ P. 2, 14, 38.

⁹ Höpfner, § 737, n. 15-18, ibique cit.

Other prohibited contracts also were those *super re litigiosâ*; for, *Pactum super re pendente lite*, everything must remain *statu quo*, nor can either dispose of their rights. *litigiosa*;

Pactum de quotâ litis, or advancing money to carry on a law-suit on the compact to receive a certain portion of what was gained, or a similar compact between advocate and client, was unlawful. *Qui improbe cœunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, Lege Julia de vi privatâ tenetur.*¹ This latter was founded on the *lex Cincia*, which restrained counsel in respect of fees from their clients.² *de quotâ litis.*

The *lex Cincia* proves that there were among the Romans, as well as at present, members of the legal profession who disgraced their order; this law prohibited an advocate from taking anything for his trouble beyond the acknowledged service by which his client was bound to him of old right; to evade this, the less scrupulous represented themselves as jointly interested in the suit, and this law remained even after they were allowed to take an *honorarium*; the *palmarium*, or present made on gaining the cause to the advocate, not being considered as within the prohibition.³ *The lex Cincia to restrain the rapacity of patrons.*

The English law acknowledges the same principle under the title of Champerty, which Blackstone derives from *campi partitio*, and defines to be a bargain with a plaintiff or defendant, *campum partire*, to divide between them the land or other matter sued for, if they prevail at law, whereupon the champertor is to carry on the suit at his own expense.⁴ To prevent these suits, it is supposed that a *chose in action*, or *jus ad rem*, was made non-assignable at common law. The English law punishes such persons by fine and imprisonment;⁵ the Roman law⁶ by forfeiture of a third part of their goods and perpetual infamy. By the Roman law, inasmuch as gambling contracts are illegal, so all implied contracts arising out of them are also invalid.⁷ *The champerty of the English law.*

§ 1515.

Contracts imply that *every one should secure his own advantage*, *Reciprocity of inventæ sunt obligationes*, says Ulpian,⁸—*ad hoc, ut unusquisque sibi adquirat quod suâ interest; cæterum ut aliis detur, nihil interest meâ*. Paulus⁹ remarks,—*Quæcunque gerimus, cum ex nostro contractu originem trahunt, nisi ex nostrâ personâ originem trahant, inanem actum nostrum efficiunt. Et ideo, neque stipulari neque emere, vendere, contrahere, ut alter suo nomine agat, possumus*, shewing that no one can contract but for his own advantage. If I obtain a promise in favor of myself and A, as regards respective shares, I can demand mine, not so A his;¹⁰ but if I obtain a benefit.

¹ P. 48, 7, 1.

² P. 2, 14, 53; P. 50, 13, 1, § 12.

³ C. 3, 1, 6, § 2; P. 17, 1, 7; P. 50,

13, 1, & 12; P. 2, 14, 55.

⁴ St. conspir. 33 Ed. 1. st. 2.

⁵ Rich. II. 4, and by 32 Hen. VIII. 9, a forfeiture of 10l.

⁶ P. 48, 7, 10.

⁷ P. 11, 5.

⁸ P. 45, 1, 38, § 17.

⁹ P. 45, 1, 11.

¹⁰ I. 3, 20, § 4; P. 45, 1, 110, & 131, § 1.

promise in favor of myself or A, A has no action, but I have an action for the whole. Nevertheless, the promissor may pay the whole over to A, and leave me to recover by an *actio mandati* from A.¹

The exceptions to this rule, that one cannot promise for another, are the following:—

A *filius familias*, or a slave, may obtain a promise for his father or master.²

A man may promise for his heir³ (this was an exception introduced by Justinian).

By virtue of office, *ex officii ratione*, a tutor⁴ for his pupill, a curator for his ward, an *actor civitatis* or syndicus for the corporation whom he represents;⁵ this is, however, not general.⁶

The factor (*institor*) who contracts in the name of his merchant, since, to a certain degree, extended to all powers of attorney.

The promise made to one on account of a third person who has an interest in the performance of the promise.⁷

Diocletian and Maximian⁸ decreed that one might promise *sub modo*, the *modus* for the benefit of a third party being introduced.

There are several other exceptions in the Roman law.⁹

§ 1516.

Lastly, the contracting parties are to be bound in the way they had intended to be bound, which may be—(a) *pure*, (b) *sub conditione*, (c) *sub modo*, (d) *sub die*. When a condition is only perfected on its fulfilment, the *pactum* is said to be *sub conditione suspensiva*; but if it lose its validity by the accomplishment of the condition, it is said to be *sub conditione resolutive*.¹⁰ This is looked upon as *purè pendente conditione*, so long as the condition remains unfulfilled, *deficit conditio*; but so soon as *conditio existit*, the contract is at an end, and void from the beginning, for *conventio retro nulla fit*, and the possessor must deliver up the thing with all profits.¹¹

With respect to the first, it is to be remarked that no affirmative physical impossibility can be made a condition, for Celsus says,—*Impossibilium nulla est obligatio*;¹² the same, put negatively, is looked upon as an unconditional contract. The same likewise applies to morally impossible conditions, whether affirmative or negative; thus to promise to do, or to omit to do, an illegal act is equally obnoxious to the law; moreover, *privatorum conventio jure publico non derogat*.¹³

A condition may be possible, but pending in uncertainty, *obligatio quidem concepta est sed in utero adhuc latet*, in which case the rule is *dies neque cedit neque venit*. So long as this is the case, the

Exceptional cases in which one can promise for another:—
The fil. fam. or serous;
pro hærede;

virtute officii;

institores.

Manner and form.
De conditionibus juris,
sub conditione,
sub modo, sub die.
Conditio suspensiva.
Resolutiva.

Conditio impossibilis.

¹ P. 45, 1, 131, § 1; I. 3, 20, § 4.

² P. 45, 1, 45, pr. 62.

³ C. 4, 11.

⁴ C. 5, 39, 5.

⁵ P. 13, 5, 5, § 9.

⁶ C. 5, 39, 5.

⁷ P. 45, 1, 38, 20; P. id. 118; I. 3, 20, 19; C. 8, 39, 3.

⁸ C. 8, 55, 3.

⁹ Vinn. ad l. 3, 20, 4; Boehmer, diss. de jur. ex pact. tertii quæsit, c. 1, § 11, seq.

¹⁰ P. 18, 1, 2, § 3.

¹¹ P. 18, 2, 5.

¹² P. 50, 17, 185.

¹³ P. 50, 17, 45, § 1.

promisee can enforce nothing, nor can either retire from the engagement, nor can the promisor do aught that may prevent the accomplishment of the condition; the conditional contract is, moreover, obligatory on the heirs of such promisor; in this, it differs from the appointment of an heir or legacies, where the promisee must outlive the fulfilment of a condition. The fulfilment of a condition dates from the time the contract was entered into; on the other hand, as soon as it is apparent that the condition will not be fulfilled, the contract is void retrospectively, that is, *ab initio*.

Conventio de spe is such as can only be executed when a casual condition exists, and may be beneficial or onerous,—in this case, the consent of both parties is *unconditionally* given, and the contract at once perfect; nor does its *validity* depend on a condition, or on whether that which one promises the other to be performed depend on a condition. An onerous *conventio de spe* may be of two kinds. If something be promised which is only due on the fulfilment of a casual condition, the contract is termed *conventio de spe simplici*; but if something be promised only in case a casual condition exist, and the other side promise somewhat else, but under condition that whatever was promised on the other side be performed, it is termed *conventio de re sperata*. To promise a fisherman a certain sum for the first draught of fish is an example of the first or simple condition; but if promised a sum certain, unconditionally, he must be paid whether he take anything or no. Whoso puts into a lottery must pay for his ticket in any case, the promise on the other side being only required to pay, conditionally, on its coming up a prize; but if one promise to give so much for every measure of corn growing the next year in a certain field, it is a *conventio de re sperata*; the one must deliver the corn *if* it grow, the other pay the price *if* he receive it.

Conventiones
de spe.

De spe simplici.

De re sperata.

A contract under a resolutive condition is perfect, *pendente conditione*, and is to be looked upon as a pure contract, so long as the condition do not exist, *deficiente conditione*; but *conditioe existente* so soon as the condition arise whereupon the contract is to become void, it is so *ab initio*, and is considered as *non avenu*, for *conventio retro nulla fit*, hence the possessor must deliver up the thing with all its fruits.¹ This condition can be appended to all transactions whatever.

Sub conditione
pendente.

§ 1517.

Modus is a clause appended only to *actibus beneficis*, such as legacies and gifts, obliging the party benefited thereby to do or omit something; it differs from the last in that it is only applicable to beneficiary acts. The *modus* is only *potestivus*; for the thing required to be done is always in the power of the promisee, thus it is not *casualis*. When a resolutive condition exists, the validity of the promise terminates, *ipso jure*; not so with a *modus*, for here

Conditio sub
modus.

¹ P. 18, 2, 5.

the promissor must sue in order to obtain the fulfilment of the contract by the promisee, and, if this be no longer possible, may go for damages.

Modus non suspendit obligationem,—he who has promised *sub modo* must fulfil irrespective of the other side, which however must give security for the fulfilment of the *modus*.¹

§ 1518.

Conditio sub die.

A contract to which a period is appended is termed *sub die* generally, which may be *ex die*; in which case the obligation only arises from a certain date or *terminus a quo*, or up to a certain date *in diem*, or *terminus ad quem*. Upon these two expressions a variety of changes may be rung, beginning with the *ex die* contracts. They may be,—1, performable on a certain day; 2, on a day sure to come some time or other, but uncertain as to when; 3, on a day certain as to the exact day, but uncertain as to its ever accruing; 4, on a day uncertain in all respects as to whether and when it may arrive. In 1 and 2, a right at once accrues to the promisee, *dies statim cedit, sed dies venit demum tempore lapso*; ² the action only lies on the expiry of the last day of the term, *totus is dies arbitrio solventis tribui debet*:³ in 3 and 4, the day is to be looked upon as a condition.

Conditio in diem.

In diem contracts may be so that the party perform an act once, as in the case of one becoming security for another for a year; or he may have to perform the act many times, as to pay a certain sum every week so long as he live.⁴

As in promises *ex die*, these *in diem* may be altogether certain, or altogether uncertain, or partaking of both. The general rule is, *pure facta obligatio intelligitur*, or *dies statim cedit et venit*,—that is, an obligation is binding on the promisee,—and as soon as the case stipulated in the contract comes to pass, a right of action accrues; but this right ceases as soon as the day comes. This does not apply to contracts entered into by solemn words.

§ 1519.

The operation of contracts obligatory or liberatory.

The operation of a valid contract is obligatory or liberatory; the first binding the parties to performance, the latter releasing them from their hitherto responsibility, either *ipso jure* or *ope exceptionis*. If the contract be not expressly limited to the person, as a *pactum personale*, or *in personam*, it is binding on heirs, and termed *in rem* or *reale*.⁵ *Donatio mortis causâ* is however an exception, for it

¹ P. 40, 4, 44.

² Ulpian, l. 3, § 3, says,—*id quod in diem stipulatur, statim quidem debetur sed peti prius quam dies venerit non potest*. That is, the legal right accrues at once, but the execution is deferred; hence in Ulpian, P. 41, § 1, *dies adjectus efficit, ne de presenti pecunia debeatur*. The last words must be held to signify *present payment*, *PK*; but this is a disputed passage.

³ I. 3, 16, § 2; P. 45, 1, 41, § 1.

Some exempla:—1. I promise to pay on the Ides of March; 2. I will pay when the now king dies; 3. I will pay on the Ides of March, if I shall be then worth a thousand pounds; 4. I will pay the sum which may have become due and owing to you on your marriage-day.

⁴ Vinn. ad I. 3, 16, § 3, n. 1.

⁵ Bachov. ad prot. Pan. p. 597 & 648, seq.; Vinn. de pact. cap. 13.

does not extend to the heirs of the donee ; and there are others connected with the personal qualities of the contracting parties as partnerships, *si personæ industria electa conventio singulari personæ fiduciâ inita est*, mandates, &c.

The *successor singularis* not being an heir of the grantor,¹ is exempt from the effects of the contracts of his predecessor : thus, in case of the sale of a house, contracts thereupon by the former possessor cannot be enforced on the buyer. *Servitudes* naturally form an exception, because they attach *in rem*.

The law² says, that whoso performs not an act which he has promised to perform, can be compelled to indemnity in damages ; but it is not clear whether the defendant have the choice of compelling specific performance. Vinnius³ thinks specific performance is not compellable ; to others it appears unreasonable that the performance of an act should not be compulsory.

Courts of equity in England look upon things contracted for as already performed, and by that fiction compel specific performance ; but courts of law can only assign damages or indemnity for the loss caused by the breach of the obligation.

§ 1520.

It is not unusual, for the greater security of the promisee, to bargain for an *arrha*,⁴ a pœnal sum to be presently due and payable by the terms of the contract itself in case of non performance : thus, the promise is to do a certain act, or pay in default thereof certain penalties. In England this is termed a bond in a penalty ; hence the question for the jury then simply is,—Did or did not the promisor execute the bond ? If the jury find he did, then the penalty to be paid is beyond dispute, and the plaintiff obtains judgment and execution for the penal sum.

Here, however, equity originally interfered to prevent a plaintiff actually taking more of the penalty than would satisfy debt and damage—a principle which has since been adopted by statute into the common law⁵—and the amount of damage must consequently be assessed by the jury according to the evidence adduced ; but if it appear that the penal sum is the amount which it was agreed between the parties should represent the damage to the promisee, in event of the promisor's default at the time of the making of the contract, then no assessment is required, and such sum is termed *liquidated damages*. In the case of a bond, the action is in debt ; in the latter case, in covenant.

The *arrha* is something similar, for it is clearly a penalty ; thus

¹ Vide § 1148, h. op.

² P. 44, 7, 44, § 6 ; P. 42, 1, 13, § 1 ; P. 45, 1, 68, 72, pr. & 75, § 10 ; Cuj. ad P. 45, 1, 72.

³ Ad. l. 3, 16, § 7, n. 2.

⁴ The Germans term *arrha*, *Angeld*, *Aufgabe*, *Angabe*, *Weinkauf*, *Reugeld*, and

vulgarly *Haftpfennig*, *Gottespfennig*, *Kaufschilling*, *Handgeld*, or *Ein Darauf*, because given upon the bargain to bind it ; the French, *des arrhes* ; the Italians, *arra* or *caparra* ; the Greeks, *ἀρραβών* ; the Latin is also *arrhābo*.

⁵ 4 & 5 Anne, 16 ; 8 & 9 Will. III. 11.

Damages and specific performance ;

in England.

The arrha.

Bonds under penalty in England.

Penalty as liquidated damages.

Arrha pæcto imperfecto data.

arrha pacto imperfecto dato is a sum given to ensure the conclusion of a contract then inchoate only, and its operation is, that if the giver of such *arrha* recede from the contract, he loses it; but if the receiver decline to complete, he must pay double,—that is, return the *arrha*, and pay forfeit to its amount, as though the other party had been the receiver.

*Arrha pacto
perfecto.
Pænitentialia.*

If an *arrha* be given *pacto perfecto*, it is said to be *pænitentialis*, or a fine in lieu of performance; in other words, it represents liquidated damages, which indeed is the origin of a penalty as connected with a contract, and may be retained by the one, or recovered, *in duplo*, by the other party as in the above case. The term *arrha confirmatoria* must be rejected as void of meaning; for, though *confirmatoria* when given, it becomes *pænitentialis* when forfeited.

Confirmatoria.

§ 1521.

*Difference be-
tween pacta and
contractus.*

It has been seen above, that every contract which fulfils three great requirements is valid by natural law. These are—competency to consent, actual consent given, and physical or moral possibility of execution.

The civil law has narrowed these requirements for the protection of the public with a view to prevent rash compacts, and to induce mature consideration in the contracting parties.¹ These restrictions have the double object,—the advantage of the commonwealth and that of individuals, and hence flows the distinction between *pacta* and *contractus*. The two points, then, to be observed are, firstly, whether a *pactum* exists according to natural law; and secondly, whether the civil law has, by acceptance, rendered such a *contractus*. The Roman jurists, therefore, have termed those *pacta* to which no civil remedy by action² applies; and *contractus*, those upon which an action can be brought.

*Pactum con-
verted into a
contractus by
formalities,
hence termed
formularii;
by fulfilment,
hence termed
reales;*

In order to convert a *pactum* into a *contractus*, certain formalities are to be observed, hence these are termed *contractus formularii* or *stricti juris*, being accompanied by certain solemn *formulae*; the execution of which is a presumption of mature consideration. But there are others in which the fulfilment of the contract itself implies a deliberation sufficiently mature to render it a binding civil contract; these are, therefore, termed *reales*. Lastly, the third description requires the simple mutual consent of the contracting parties, hence such contracts are termed *consensuales*; in these, then, the natural law is simply adopted into the civil law, which confers upon them validity without further requirements. They are, however, limited in number, and specified to be *emptio venditio*,

*by consent,
termed consen-
suales.*

¹ Bynkershoek, diss. de pactis stricti juris contr. adject. c. 1, in opusc.; Halens, p. 94, gives other grounds; Guil. Best orat. de pact. et contr. sec. jur. gent. et rom. nat.

et æquit. et in cod. Ratio emendandi leges, Leip. 1745, App. p. 69, et seq.

² Galvanus, de usutr. c. 17; Noodt, de pact. et transact. c. 9.

bargain and sale; *locatio conductio*, letting and hiring; *societas*, partnership; *mandatum*, agency; and *emphyteusis*, which is a comparatively recent introduction, and consists in letting land on a perpetual lease for the purpose of improvement, or of being reclaimed from a state of sterility and put into cultivation.

§ 1522.

A mere *pactum* gave no ground of action by the old law: thus Paulus says,¹—*Ex nudo pacto inter cives Romanos actio non nascitur*; but more recent legislation modified this rule, granting an action on certain *pacta*, without, nevertheless, transferring them into the category of the five contracts above alluded to, these for the sake of distinction are termed *pacta justa*² or *non nuda*; and the others, *nuda*, *sola*, *simplicia*, or simply *pacta*.³

Attributes of a pactum.

Divers species of pacta:

When *pacta* are confirmed by any more recent law, they are termed *legitima* or legal; when the prætor made them operative by his edict, they are called *prætoria*; lastly, certain *pacta* obtained operative force by being *adjecta*, or appended to a contract acknowledged to be valid; and as such come under the title of legal pacts to which they are accessory.

Under *pacta legitima* came marriage compacts and donations,⁴ on which the later law gave an action, without, nevertheless, making them contracts. The contract for *nauticum fœnus*⁵ was also a legal contract; this consisted in the person who advanced money to be transmitted beyond sea, undertaking the insurance in consideration of a higher rate of interest than is usual for simple loans. In like manner, where one lends another corn, and bargains for interest thereupon.

pacta legitima;

Under *pacta prætoria* are to be placed *pacta remissoria*, which are those *pacta nuda* in which the prætor granted an *exceptio pacti* on equitable grounds: thus Ulpian says,⁶—*Nuda pactio obligationem non parit, sed parit exceptionem*.

pacta prætoria;

Thus, if A remit a debt to B by a *pactum nudum*, and, nevertheless, sue him for it thereafter, the prætor grants B the *exceptio pacti*; the effect of this plea must be accounted for by the presumption that a valid contract can only be remitted by another as valid, and this validity the prætor chooses to presume, in order to do equity, because it is unreasonable that *quod semel remisit creditor debitori suo bonæ fidei iterum hoc conetur destruere*.

Again, the *contractus hypothecæ* already explained,⁷ the consti-

¹ R. S. 2, 14; Vinn. tract. de pact. c. 6.

² Modern jurists term these *vestita*.

³ Cujacius, obs. lib. 11, c. 17, et ad L. 1, D. de pact. Wachtendorf, diss. de pact. nudis in diss. triad p. 389, contend that classic jurists did not recognise these terms; but Bachov. ad prota Pand. p. 564, Vinn. l. c. 5, § 5, support the contrary opinion.

Certain it is that they were in conformity with the spirit of the Roman law.

⁴ These are sometimes termed contracts, C. 4, 21, 17; P. 12, 1, 20; but the word must be understood in its general sense.

⁵ P. 22, 2, 7; P. 22, 1, 30; P. 4, 32, 17; Nov. 136, 4.

⁶ P. 2, 14, 7, § 4.

⁷ § 1464, h. op.

tutum or promise to do a certain thing dependent upon an already existent obligation termed promissory, or possessory resulting from possession, and the *pactum de jure jurando*, which is a promise to pay a certain amount, on the debt being sworn to be due, and when such oath has actually been made.¹

pacta adjecta;

Under *pacta adjecta* are to be counted the *pacta de retrovendo*, or agreement for the first refusal of an object sold; under the same head come the *pacta*, otherwise termed *contractus fiduciæ*, usual in emancipations where a promise is interposed to remanipate to the natural father, in order that he may retain his *jura patronatûs*,—for this *pactum* is *adjectum* to the form of bargain and sale by which emancipation was performed; but this was equally applicable to all objects transferred by the ancient solemn form of mancipation in which the honorable compact or *pactum fiduciæ* was interposed.² Justinian, in abolishing the distinction between *res Mancipi* and *nec Mancipi*, virtually abolished this, which is ancillary to them.

pactum fiduciæ.

Although the prætors' edict applies to remissory, it is doubtful if it apply to obligatory pacts; all the cases cited on the decided cases are of obligatory ones, and this is one ground to infer that the exception applied to such only, the more so as the exception would not be available in the other case.³

§ 1523.

Quasi contractus.

Quasi contracts arise out of acts whereby a man is obligated in like manner as he would have been by a contract: thus a tutor is obligated to the due administration of his pupill's property, who is liable on his own part to reimburse his tutor his lawful expenses, as though an express contract had been entered into to that effect. The obligations which thus accrue are said to originate *quasi ex contractu*. These implied contracts are of the greatest importance, since the question then arises as to whether or not a certain act amount, in fact, to a contract, and are reserved for discussion in their proper order.

§ 1524.

Contracts proper.

Proper contracts are, then, agreements between two parties on a sufficient cause and consideration, with an action to enforce performance. *Contractus est conventio, habens certum nomen vel causam sui naturâ obligationem ad agendum efficacem producents*.⁴

Nominate or innominate.

Proper contracts are, furthermore, *nominati*; that is, may pass under certain known denominations having *actionem propriam et cognominem*, and named after the remedial actions which apply

¹ I. 4, 6, § 11.

² Conradi describes these at length, Exerc. I. and II. de pact. fid. recus.; Hein. ad Vinn. tit. de act. § 7, n. 12; Hellfeld, diss. de hypoth. mob. c. 2, § 7, seq. in

opusc. p. 154; Erleben, princip. de jur. pig. et hypoth. p. 17, seq.

³ FK; but Weber, nat. Verbind. § 81, thinks otherwise.

⁴ P. 2, 14, 7, § 1 & 2.

to them : thus we have the *condictio certi ex mutuo* or action of debt arising out of the *mutuum* or loan for consumption, and the *actio commodati directa* or *contraria*, peculiar to the *commodatum* or gratuitous loan for use of an imperishable object ; the *actio depositi* for the recovery of a thing bailed to another without hire ; the *actio pignoratitia* or *hypothecaria* for enforcing the rights of pledgees ; but all other *contractus reales* are *innominati*, or designated by no particular name.

The *contractus consensuales* are likewise *nominati* : thus *emptio venditio* produces the *actionem empti et venditi* ; the *locatio conductio*, the *actionem locati et conducti* ; the *societas*, the *actionem pro socio* ; and lastly, the *emphyteusis*, the *actionem emphyteuticariam*.

Consensual contracts are nominate,

The *contractus formularii* belong to the category of the *nominati* : thus the *actio ex stipulatu* arises out of the *contractus stipulationis*, and is the only formular contract which survived Justinian's legislation which abolished the other two ; viz., the *solemnis dotis dictio*, or solemn promise of a portion by the father to the son-in-law, and the *promissio operarum a liberto facta*, which was the only case in which an action lay on a promise because confirmed by oath.¹

also formular contracts.

Other contracts to which a general remedy applies, viz., the *actio præscriptis verbis*, or action on the case, are termed *innominati* : and it is quite possible that a contract may have itself a name, as the *contractus permutationis*, and yet be innominate, because its belonging to one or the other category depends upon the remedy, not upon the contract itself.

Innominate contracts.

For greater clearness, the *contractus innominati* have been divided into four classes :—

Innominate contracts are divided into four classes :—

The first of which is represented by the expression *do ut des*, which is a *permutatio*, or the exchange of one object for another, as of a horse for an ox.

Do ut des ;

The second is conveyed by the term *do ut facias*, in which something is given in consideration of labor to be performed, as the giving a peasant corn in consideration of his ploughing land.

do ut facias ;

The third is the converse of the above *facio ut des*, in which the peasant stands first, and ploughs the land in consideration of receiving corn.

facio ut des ;

The fourth is *facio ut facias*, in which an act is done by the first party upon the understanding of another act being performed by the second party ; the one, for instance, paints a portrait in consideration of the other reviewing his gallery.

facio ut facias.

§ 1525.

In contracts the one party usually promises to do, grant, or suffer something, the other accepts, and *vice versa*—the latter

Contracts are unilateral, bilateral, or reciprocal.

¹ Cuij, inst. 2, 9, § 4, in quem vide Donnell, in comm. I. C. 2, 18 ; et A. Faber, in conjec. 26, 18, vide et Malblanc, in doct. de jur. sur. p. 319, sq. § 1522,

h. op. The freedman was liable to his patron for operæ officiales, but not for operæ fabriles, except thus stipulated for, § 515, h. op.

Contractus
unilateralis.

promises, the first accepts that promise ; there are, nevertheless, contracts in which the one party only is bound *aliquod præstare*, but not the other. Such unilateral contracts are sometimes also termed *unilaterales* or *simplices*, while the others pass under the denomination of *bilaterales*, *duplices*, *reciproci*.

The contractus
bilateralis is
æqualis or
inæqualis.

The *mutuum*, or loan ; the *stipulatio*, or solemn formal promise ; the *fidejussio*, or suretyship ; the *contractus literalis*, or contract in writing ; and the *contractus innominati*, before mentioned, are all of them *contractus unilaterales* ; for the promise is only on one side to perform some act, such as the restoration of a loan, or to grant something, without any corresponding promise on the other side.

When two parties are at once equally *ab initio* bound by a contract, it is termed *bilateralis æqualis*, but *inæqualis* when the one party becomes bound by it subsequently ; hence the terms refer to the initiation of the contract, not to its ultimate operation. Bargain and sale is an instance of the first, for here the vendor is *ab initio* bound to deliver the object, and the purchaser to pay the price ; but a deposit is an example of the latter, because the deponent is not at once bound to any reciprocity which may hereafter arise out of some accidental circumstance, such as damage caused to the depositary by the possession of the pledge,—hence it is a *contractus bilateralis inæqualis* : it is, however, well to remember that these terms do not belong to the classic period of Roman jurisprudence.

Actions arising
out of unilateral
contracts ;

out of bilateral
contracts.

Out of unilateral contracts arises a single action only : thus, the *mutuum* gives the *condictionem certi ex mutuo* ; the *stipulatio*, *actionem ex stipulatu* ; the *litterarum obligatio*, the *condictionem ex chirographo* ; and the innominate contracts, *actionem de præscriptis verbis* ; whereas the *contracti bilaterales æquales* produce two *actiones directas*, as in the case of *emptio venditio* ; and the *inæquales* one *directam*, and another *contrariam*, as in the case of a *depositum*.

Contrariæ.

With respect to *actiones contrariæ*, the rule is that the object of both is indemnity : as of a *depositarius*, in the case of a *depositum* ; of the *commodatarius*, in the case of a *commodatum* ; or of the pawnees, in cases of pledge ; the *actio* being respectively *depositi*, *commodati*, or *pignoratitia contraria*.

§ 1526.

Contractus bonæ
fidei and stricti
juris.

A contract *stricti juris* differs from the *bonæ fidei*, in that in the former the parties are bound strictly by the letter of the oral or written contract, but in the latter expected to perform such accessory acts as may be usual in contracts of this description, but which have been considered as implied, and therefore omitted to be expressly mentioned ; hence *contractus stricti juris* came to signify such only as were concluded in a fixed form of words, all others being termed *bonæ fidei*. Of the former description are *stipulationes*, *litterarum obligationes*, but a *mutuum*, *commodatum*, *depositum*,

pignus, *emptio*, *locatio*, *societas*, *mandatum*, and *societas* are of the latter, or *bonæ fidei*.

The chief distinction existing between the two kinds is, that in the *stricti juris contractus* no interest can be demanded, while it can in the *contractus bonæ fidei* as soon as any *mora* or default occurs.

Distinction between the two consisted in the accretion of interest or damages.

A contract *stricti juris*, if founded on fraud, can be only destroyed by a *restitutio in integrum*; but the contract *bonæ fidei* was *ipso facto* void on the discovery of fraud in the inducement thereto.

If a creditor be reciprocally indebted in a certain sum to his debtor on a *bonæ fidei* contract, it might be set off *ipso jure*; not so in the case of the contract *stricti juris*, for then if the creditor sue, he must be first met by the *exceptio doli*. Justinian abolished this difference, indeed he left, as we have already seen, but one *stricti juris* contract, that of stipulation.¹

A contract to give a previous contract additional force is termed *accessorius*, in distinction from the *principalis*; such are contracts of pledge, or of surety to insure performance of the agreement in chief.

§ 1527.

Damnum, or damage, is the loss accruing to one of two contracting parties, by the default of the other party in the performance of his obligation. It may consist in the loss of property, of advantage, or of a perfection: thus, in respect of the object, the *damnum* is as diverse as the object out of which it accrues, for health, a fair name, moveable or immoveable property, may be injured, and hence a damage may arise.

Damnum.

Damnum may be *positivum*, otherwise *emergens*; that damage arising from the absolute loss of a thing by some action of another, or that which prevents the continuance of an existent or prospective profit, termed *privativum*, otherwise *lucrum cessans*. A *damnum* may be *casuale*, when arising accidentally, or the result of the lawful or unlawful act of another. In the first case, it is termed *indirectum*, or *damnum in consequentiam veniens*, lawful damage, for *qui ipse jure suo utitur nemini facit injuriam*;² but in the latter case it is termed *damnum directum*, unlawful damage; and such damage may be done designedly, through carelessness, or from want of forethought: hence the distinction of *damnum dolosum* and *damnum culposum*.

Damnum is positivum;

privativum casuale;

indirectum;

directum.

Damnum may arise out of a *mora* or delay and the circumstances of an accident, for which the obligee may be, in certain cases, rendered responsible.

Mora or default

§ 1528.

Of these, *mora*,³ or delay, first demands attention; it is a *Mora*.

¹ In Germany, all *stricti juris* contracts whatever are abolished; Glück in Hellfeld, Th. 4, § 296; contra, Cocceii, jur. contr. 4, 3, 2; Puf. 2, 73, p. 276. In England a court of law will award execution on a *stricti juris* contract, which a court of equity will annul.

² P. 50, 17, 49.

³ Sometimes the same conception is conveyed by the terms *frustratio*, *cessatio*, *dilatio*, although these are all, strictly speaking, applicable to peculiar cases.

degree, and involves certain measure of blame. The damage occasioned by the delay, on the part of the deliverer, is termed *mora solvendi*, and may be *nocua* or *innocua*, upon which fact the responsibility will depend. In the first case, the general rule being *mora in morosum omne transfert periculum*: thus, if on account of a deferred delivery the thing be lost, the obligee must bear the consequences, and make indemnity; not so if it be proved that the object, even if delivered at the proper time, would equally have been lost;¹ and here we may suppose the case of delayed transshipment where both vessels are lost, or of transfer from house to house where both are burned, then no damage has, in fact, accrued to the recipient.

Mora may be on the part of the debtor, or on that of the creditor.

Mora may be *præstandi sive solvendi* on the part of the obligee, or *accipiendi* on the part of the obligor. In the first case, the debtor does not perform his contract within the proper term; in the latter, the creditor does not accept the performance by the debtor at the time agreed.

Mora solvendi accrues by demand, by law, by lapse of term, or by personal demand. Constructive demand.

The *mora*, or default, commences with the point of time at which the debtor is bound by his covenant to satisfy his part of the contract; but this is designated in three several ways,—*aut lex, aut dies, aut creditor interpellat*; of these, the first two may be termed constructive, the latter actual. In certain cases the law provides a day upon which certain contracts should become due, which is a constructive demand, and since *privatorum conventio juri publico non derogat* and *utilitas publica præfertur contractibus privatorum*;² moreover, since no private agreement can alter solemn contract, *nec ex prætorio nec ex solenni jure privatorum conventionē quicquam immutandum est*,³ so law has precedence in certain particular cases overriding all other circumstances: thus legacies are due within a certain time after administration, and generally in all cases where the common law has absolutely fixed a day for payment, non-payment on that day constitutes a *mora*, though in certain cases the common law allows a discretion in private parties to extend or anticipate the legal term.

Constructive demand by agreement.

Secondly, *dies interpellat pro homine*,—this, too, is a constructive demand; for the creditor is not under the necessity of applying to his debtor when the day of payment has been fixed absolutely by testament, special agreement between the parties, or order of the court, here the day is said to apply for payment in the place of the man, and the default dates from that day. The English law agrees with this, a day fixed by deed is sufficient; but not so in the case of the maker or acceptor of a bill or note, if payable at or after sight, or “at certain persons.” The demand in these two cases is, in fact, taken as given, and is therefore constructively made on the day when the obligation becomes due; hence both these are termed *mora ex re*.

Actual demand.

Thirdly, when neither the law nor special agreement interfere,

¹ P. 16, 3, 14, 1.

² P. 50, 17, 45, § 1; C. 12, 63, 2.

³ P. 50, 17, 27.

debitor interpellandus est; and from the moment of such demand by the creditor, the debtor is *in morâ*, which is termed *ex personâ*.

It matters not whether the *mora* or default arise out of carelessness or design; the creditor may, before the debtor is in default, grant him further time if not contrary to the common law, and thereby anticipate the *mora*; but no *mora* accrues where the court has attached the object of the contract on account of a debt not presently due.¹

Default may be remitted by previous condonation;

or by attachment.

Sometimes delay vitiates the whole contract by special agreement, as when money be not paid at the stipulated time, or the performance of the contract delayed till it become useless to the obligator.²

Mora may vitiate a contract,

If the delay diminish the worth of the object in a case of *negotium stricti juris*, the highest value the object bore between the commencement of the delay and that of the *litis contestatio* becomes due; but in *judiciis bonæ fidei*, whatever has accrued up to the time of condemnation;³ or, if the object perish before condemnation, then the highest value the object bore up to the time it perished; if it only suffered deterioration, then the difference between the highest value it bore before deterioration and its present value will represent the measure of indemnity.

or diminish the value of the subject matter.

Thus far we have considered the delay of the deliverer, now let us turn to that of the receiver, which is the negative proposition, termed *mora accipiendi*; here if the tender have been made, but refused without sufficient grounds, and thereupon be paid into court sealed up, whence it is stolen, the creditor bears the loss. The debtor is, moreover, absolved from *usuras moræ* by the refusal of the creditor to receive at the stated time; on the same principle, deterioration occurring after tender must be borne by the creditor.⁴

Mora accipiendi.

§ 1529.

We now pass to the question of *dolus*, and there is perhaps none more important in a logical point of view, nor any upon which more has been written by the most able logicians and lawyers in all ages, than that of the *dolus* and *culpa*.

Dolus.

Donellus, Duarennus, Cagnolus, Contius, Baro, Fornerius, Rævardus, Bargius, Titius, Lauterbach, Pothier, Thibaut, Höpfner, von Savigny, Story, Jones, Hasse, and many others have exhibited great perspicuity, and have bestowed infinite labor on this subject; the most modern are Story and Hasse. The latter has dedicated an entire work, exclusively to this matter, which extends over 600 closely printed octavo sides and exhausts the question; to this work, which contains a summary of all previous treatises,

¹ 1 Puf. T. 3, 170.

² Puf. tom. 1, obs. 40, § 6.

³ P. 13, 1, 8, § 1; P. 13, 3, 3; P. 17, 1, 37; Leyser, sp. 150, m. 1, 2, 3; Glück,

Pand. Th. 4, § 330, et Th. 13, § 844, p. 290.

⁴ P. 19, 1, 3, § 4; Glück, cit. § 844, p. 297.

those who are masters of the German language are referred ; but such as are not in a position to profit by that excellent work, must rest contented with the elegant treatise of Sir William Jones, and the commentary of that acute and profound American jurist Story.

Definition of the word *dolus*.

The first point for consideration is the meaning of the word *dolus*. *Dolum malum Servius quidem ita definit, machinationem quandum alterius decipiendi causâ, cum aliud simulatur, aliud agitur.* Inasmuch, however, as it is possible to circumvent a man without a false pretence, Ulpian¹ continues,—*Labeo autem posse et sine simulatione id agi ut quis circumveniat, posse et sine dolo malo aliud agi, aliud simulari sicuti faciunt, qui per ejusmodi dissimulationem servant, et tuentur vel sua vel aliena. Itaque ipse sic definit, dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum decipiendum alterum adhibitam ;* and Ulpian hereupon remarks,—*Labeonis definitio vera est.* Now, if this definition be analyzed the exact meaning of *dolus* may be arrived at,—it is all cunning, deceit, or means employed to circumvent, deceive, or take in another ; it is not strictly necessary to assume a character or circumstance other than the truth, or to conceal them. Any cunning contrivance wilfully effected, whereby it comes to pass that another is deceived, suffices to constitute a *dolus malus*, which implies a certain malicious intention to wrong another. This *dolus malus* is distinguished from *dolus bonus*, and the prætor always added the qualificatory adjective in order to define exactly what was meant. *Non fuit autem contentus prætor dolum dicere sed adjecit malum, quoniam veteres dolum etiam bonum dicebant et pro sollertia hoc nomen acceperant maximi si adversus hostem latronemve quis machinaretur.* This *dolus bonus*, then, is a justifiable deceit, and so far lawful, because permitted ; it was no *dolus* to conceal money from a robber by false asseverations, or to circumvent an enemy by machinations, because the robber was engaged in an unlawful act, and fraud is to be met by fraud ; in a moral point of view the point may be more doubtful ; nevertheless, since any promise given to an enemy or to a robber is given under duress, which excludes the supposition of that free consent necessary legally to bind the contracting parties, it is no valid consent, no consent has been given in law, though it has so in fact. The means by which the end has been attained is, nevertheless, grounded on a deceit ; it is, therefore, clearly a *dolus* in respect of the party upon whom it operates. *Dolus*, therefore, when used alone is equivalent to *fraus*,² which is never used in any but a reprehensible sense. *In fraude legum, or in fraudem legum*, is to do that which the law does not forbid : in so many words, it is a circumvention of the law, and that which is

Dolus malus.

Dolus bonus.

Dolus is fraus.

¹ P. 4, 3, 2.

² Pand. 16, 3, n. 25 ; P. 13, 6, 5, § 2 ; P. 50, 17, 23. Story thinks Jones and Pothier do not use the word *dolus* in the

intense sense of *fraud*. Story, Bail, § 20, a, & § 65 ; Poth. Traité de Depot, n. 23 & 27 ; Id. de Mund. n. 211 ; Id.

contrary to its spirit, an evasion of the law. *Fraus legum ubi id fit, quod lex fieri noluit, fieri autem non vetuit.*¹ Again, in *fraudem legis facit, qui salvois verbis legis sententiam ejus circumvenit.*² *Dolus* is a more general term than *fraus*, and *tum in verbis tum in rebus locum habet, fraus præcipue et proprie in rebus*; but this distinction is rarely observed.³

This *dolus malus* is also termed *dolus ex proposito*, or *personalis*, or malice aforethought, and may be *clandestinus* or *manifestus*; but it is said to be *ex re* or *reales* where the knowledge of the damage done is acquired after the act. The prætorian restitution presumes the worst degree of fraud, or the *dolus ex proposito clandestinus*; nor can any condition be appended to a contract exempting the party from the consequences of his own fraud, *nec valet si convenerit ne dolus præstetur.*⁴ On the contrary, a covenant making an heir answerable for the frauds of the deceased is valid, for *in contractibus quibus doli præstatio vel bona fides inest, hæres in solidum tenetur.*⁵ * * * *In contractibus successoris ex dolo eorum quibus successerunt non tantum in id quod pervenit, verum etiam in solidum tenentur.*⁶

Dolus malus, personalis, clandestinus, manifestus.

Covenant not to be liable for *dolus* void.

This is to be understood of future fraud, *de dolo futuro pacisci non licet*, but not of a fraud past, for that may be released by the declaration of the person defrauded, that he will not claim indemnity, and by the acceptance of such offer by the other party, thus *de dolo præterito pactio valet.*⁷

In some contracts the *dolus* involves the penalties of infamy, as in the so-termed *contractus amicorum*; viz., *depositi, societatis, mandati, tutelæ*, because these are concluded with those supposed to be friends, and as *dolus* in such cases involves a violation of confidence.

No one can derive any benefit from the fraud of a person acting for him, *alterius circumventio alii non præbet actionem*,⁸ whether it be or be not fraud is to be judged of by the event considered in connection with the intention, *fraudis interpretatio semper in jure civili non ex eventu duntaxat, sed ex consilio quoque consideratur.*⁹

No benefit is derivable from the fraud of another. In fraud, the intention and event must be taken together.

§ 1530.

The next question to be considered is that of *culpa*, upon which a diversity of opinion prevails still greater than upon the *dolus*. *Culpa*.

Culpa is blame without imputation of fraud attaching to a person in respect of something he is bound to perform, in the performance of which, had he not shewn some degree of neglect, the damage accruing to another party might have been prevented.

¹ P. 1, 3, 30, Ulpian.

² Paul. R. S.; P. 1, 3, 29.

³ Plaut. Rud. 3, 2, 42.

⁴ P. 50, 17, 23.

⁵ P. 50, 17, 152.

⁶ P. 50, 17, 157, § 2.

⁷ Müller ad Leyser, obs. 858.

⁸ P. 50, 17, 49.

⁹ P. 50, 17, 79.

It must be borne in mind that *culpa* is used here strictly as a technical juridical, and not simply as a general term.

Culpa is connected with *diligentia* and *negligentia*.

Connected, nay, inseparable from this technical conception of the *culpa* is that of *diligentia* or *negligentia*, since he who is in fault has exhibited, necessarily, a greater or less amount of diligence or negligence.

Divisions of the *culpa* by civilians.

Some jurists support a quintuplex, others a triplex, and others, again, a duplex division of the *culpa*, while some repudiate all degrees in a grammatical sense; maintaining that, as the shades of blame vary infinitely with the nature of the contract, the reciprocal obligation of the parties to it, and with the peculiar circumstances of each individual case, no mathematical accuracy can be arrived at; which appears, indeed, to be the most reasonable view. This diversity of opinion results from the variety of expressions to be met with in the Pandects, attributing divers adjective degrees to the *culpa*, as *lterior*,¹ *magna*,² *gravior*,³ *latissima*, *levis*, *levis-sima*, whereupon Lauterbach on Titius⁴ remarks that this distinction *hæc res magis in scholis quam in foro auditur*; and Otto observes,⁵ that all things having degrees cannot be distinguished with mathematical accuracy, — *juxta ἀκριβέως mathematicam*. Bartholus⁶ would distinguish *lata*, *lterior*, and *latissima*, others between *culpa versutiae* and *culpa negligentiae*,⁷ *culpa in faciendo* and *in non faciendo*, but all these where they occur in the Digest must be considered as general, and not as special terms.

Conflict of opinions.

The reduction of the blame under its proper head is, therefore, a matter of great difficulty. Donellus considers it insoluble; Stryk⁸ would leave all to the *arbitrium judicis*; Thomasius⁹ considers the question of assigning the degree of blame the most difficult in the whole Roman law; and upon the classical passages, many of the most distinguished jurists have written separate treatises, which may be referred to; among which, those of Contius, Rittershussius,¹⁰ Prousteau, Meermann,¹¹ and d'Averzan,¹² Reinold,¹³ and Gothofredus,¹⁴ and Thibaut,¹⁵ deserve particular attention.

Under these circumstances it is a matter of difficulty and legal danger to attempt the enunciation of even general rules; nevertheless, some attempt of this nature must be ventured upon: generally, then,

General rules.

If a damage arise from the fault of one, between whom and another party no contract exists, the degree does not come into

¹ P. 16, 3, 32.

² P. 41, 2, 1, § 5.

³ P. 41, 1, 54, § 2.

⁴ Obs. 102.

⁵ Diss. de præst. cas. solet. etc. 1, 11; P. 13, 6, 5, § 2; P. 50, 17, 23; P. 30,

1 (1), 47, § 5; C. 8, 14, 19.

⁶ Ad D. 16, 3, 32.

⁷ Schulting, th. 18, 8.

⁸ Us. mod. tit. com. § 12.

⁹ Diss. de usa pract. doctrin. de culp. præst. in contract, 1, § 1; Leyser, sp. 154, med. 1.

¹⁰ Arg. 1659, 4, tom. 3.

¹¹ P. 26, de contr.

¹² 4, 54.

¹³ Diss. ad h. t. in opus. p. 303, et seq.

¹⁴ Ad tit. de R. I. in opus. p. m. 790.

¹⁵ Pand. cit. § 250.

consideration,—for in all cases he must make an indemnification for the damage, with the exception of a *bonæ fidei* possessor, who is not liable at all for damage; and of a usufructuary, to whom a slight degree of blame only, *culpa levis*,¹ attaches. But if the subject-matter be one of contract between the parties, there is no doubt but that the contrahents may specially pre-arrange the degree of blame either is to bear in case of default.

Degree of blame may be pre-arranged.

If no special arrangement has been come to, and the performance of an act has been agreed upon, a tacit understanding that such act will be performed in a business and workmanlike way will be presumed;² and if this tacit undertaking be not complied with, the law will assign a measure of indemnity equal to the damage sustained: thus a *negotiorum gestor*, a *tutor*, a *mandatarius* will be held answerable in slight degree only.

Tacit understanding.

If anything be given under a promise of restitution, whereby the depositary derives no benefit, but may suffer damage, all the advantage being on the side of the depositor, the depositary can only be made answerable in a slight, but the depositor in a great degree.

If both may derive advantage, and both suffer damage, then either is liable in a slight degree.

Where a disagreeable office is forced upon a party, he is answerable only where gross blame can be imputed.

Where the duty to be performed requires extraordinary diligence, the party so undertaking it is liable only in a slight degree; that is, only in the case of gross negligence.

Hence the general rule has been laid down by civilians, that *secundum utilitatem contrahentium culpa est præstanda*.

General rule deducible from the Pandects. Ulpianus ad Edict.

The above rules are deducible from the following passages in the Pandects:³—

Nunc videndum est, quid veniat in commodati actione; utrum dolus, an et culpa an vero et omne periculum? Here the three great divisions are propounded,—*dolus*, whereupon no doubt can exist; *culpa*, which is the question at issue; and *casus*, for which latter, contracting parties are liable under any particular circumstances only.

Et quidem in contractibus interdum dolum solum, interdum et culpam præstamus, here the *præstatio doli* is put as an extreme case for *dolum in deposito*, *nam quia nulla utilitas versatur, apud quem deponitur merito dolum præstatur solus*; then comes the exception, *nisi forte mora accessit, tunc enim ut est et constitutum etiam culpa exhibetur*. Clearly so far, then, it ceases to be a deposit, which must be gratuitous, *aut si hoc ab initio convenit, ut et culpam et periculum præstet is penes quem deponitur*; here comes a special undertaking, to indemnify which, being a matter respecting which a contract can be lawfully entered into, is binding on the parties. *Sed ubi utriusque utilitas vertitur ut in empto, ut in locato, ut in dote, ut in pignori, ut in societate, et dolus et culpa præstatur*.

The mutual utilitas.

Special undertaking.

¹ P. 41, 2, 49.

² P. 7, 1, 65, pr.

³ P. 13, 6, 5, § 2, seq.

About *dolus*, of course, there is no doubt; the *præstatio, culpa* in this case, is founded on the mutuality of advantage,—here such a measure of damage would be clearly due, as the circumstances of the case would justify. But who can say that it should be in all cases *latissima, latior, lata, levis, or levissima*? *Commodatum autem plerumque solam utilitatem continet ejus, cui commodatur; et ideo verior est Quinti Mucii sententia, existimantis, et culpam præstandam et diligentiam*,—here *culpa* is to be answered for, but what degree is naturally not decided; but yet we find *diligentia* is put in conjunction, however, with *culpa*, shewing on good grounds that positive or due diligence will be required where there is no *mutua utilitas*.

Disputed passage in the Pandects.

Another disputed passage of the Pandects¹ is also worthy of notice in connection with this question:—*Contractus quidam dolum malum duntaxat recipiunt; quidam et dolum et culpam*. Here evidently no distinction is intended to be drawn between *dolum malum* and *dolum*; læsion in some contracts rejects all but the extreme case of *dolus*. The mention of *dolus* at all may appear surplusage, since fraud is undoubtedly obnoxious to all contracts. These contracts are then defined:—*Dolum tantum depositum et precarium; dolum et culpam, mandatum commodatum* (and here a less degree of diligence is required for a commodatum than in the above passage), *venditum, pignori acceptum, locatum* (item), *dotis datio tutelæ, negotia gesta* (in his quidem et diligentiam), *societas, et rerum communio, et dolum et culpam recipit*. This passage has given rise to more disputes than the collective passages of the Roman law on this subject. Some maintain it to be corrupt; some that it has been interpolated by Trebonian; some will read *iis*, and quidam, and quædam; others *diligentia*, and understand *præstatur*, repudiating *diligentiam* as a medieval amendment; some will add *sed* before *societas*; by far the majority of MSS., and amongst them the Florentine copy, read *diligentiam*, against which there appears no valid argument.² With respect to this passage, then, it may be maintained that Ulpian wrote it in effect, without the words in brackets,—viz., that the *mandatum, commodatum, venditum, pignori acceptum, locatum, dotis datio tutelæ*, and *negotia gesta, societas, and rerum communio*, were satisfied by the *præstatio culpæ*. That the practice had undergone a change since Ulpian's time, and that Trebonian's commission altered his text to suit the changed circumstances, is not at all impossible; and as the whole Digest was not by the same hand, discrepancies must be expected; and it may be naturally supposed, that although a passage might have been altered in one part where it has direct application, a similar passage might have escaped observation and amendment in another where its application was

¹ Celsus, P. 50, 17, 23.

² Hasse, über die Culpa des R. R. Ed. 2, 1838, § 65, n. 2, in which, and in the

text, this question is discussed even to confounding.

direct to another subject, and indirect in this. But why, it will be asked, did Ulpian except the *commodatum* in the first passage, and attribute *diligentia* to it, and pass it over without remark in the second? Or why did not Trebonian, while he was about it, make the two agree? Here we must suppose one of two things: either that the opinion of Q. Mucius was imported aliunde by Trebonian into Ulpian ad Edictum, and forgotten in Ulpian ad Sabinum, or that Ulpian himself was not infallible; at any rate the passage ad Edictum contained the better logic of the two.

The general object, too, of this passage must be borne in mind, —viz., to shew in what cases *dolus* solum præstatur, in which *culpa*, and consequently *dolus* also; for the passage goes on to say, *Sed hæc ita, nisi si quid nominatim convenit, vel plus vel minus in singulis contractibus; nam hoc servabitur quod initio convenit; legem enim contractus dedit; excepto eo quod Celsus putat, non valere, si convenerit ne dolus præstetur; hoc enim bonæ fidei contrarium est; et ita utimur.* The expression *vel plus vel minus* clearly premises that no degrees of *culpa* have been given, yet here we find a degree by the insertion of the term *diligentia*, which clearly implies something more than *culpa* generally. The passage then goes on to treat of accident: *Animalium vero casus, mortes quæque sine culpa accidunt, fugæ servorum, qui custodiri non solent, rapinæ, tumultus, incendia, aquarum magnitudines, impetus prædonum, a nullo præstantur.*

In *summa*, then, there exists here clearly an interpolation of Trebonian adapting Ulpian to the practice of the court in this particular. Summary.

§ 1531.

Another dispute is, whether *culpa lata* or *latior*, gross or very gross blame—that is, *lata* or *latior negligentia*—is equivalent to *dolus*; that it is not so would be sufficiently manifest if it were not for certain passages in the Digest. In conception the two differ widely,—*dolus* arising out of fraudulent intention, but *culpa* being blameable neglect, devoid nevertheless of the *animus fraudandi*.

Culpa lata differs from dolus.

That any gross neglect may in its effect upon the party be equally injurious with *dolus* cannot be denied, but that does not make it deceit. The passage which has created the greatest difficulty is the following of Celsus: ¹—*Quod Nerva diceret latiore culpam dolum esse Proculo displicebat mihi verissimum videtur. Nam etsi quis non ad eum modum, quem hominum natura desiderat diligens est, nisi tamen ad suum modum curam in deposito præstat, fraude non caret; nec enim salva fide minorem iis, quam suis rebus diligentiam præstabit. Dolus, in this sense, cannot be taken to be more than a dishonest action; that is to say, that if a man pays less diligent attention to the affairs of another than he usually does to his own, it is a dishonest neglect, amounting morally to a fraud.*

¹ P. 16, 3, 32.

As far as can be judged,¹ the sect which took its name from Proculus adopted equitable principles ; these began with Labeo, and were Labeo, Nerva, Proculus, Pegasus, Celsus pater, Celsus filius, and Neratius Priscus. The adverse sect, which consisted of Capito, Cassius, Cælius Sabinus, and C. C. Longinus, adhered to strict legal doctrines. *Hi primum veluti diversas sectas fecerunt ; nam Ateius Capito in his qui eo tradita fuerant perseverabat, Labeo ingenii qualitate, et fiduciâ doctrinæ, qui et in cæteris operam dederat, plurima innovare instituit.* Here, however, those of the same sect do not appear to have been of the same opinion, for Celsus agrees with Nerva, and disagrees with Proculus. No argument can then be drawn from a diversity of sect principle. Paulus,² too, enunciates the same principle : *Magna negligentia culpa est, magna culpa dolus est*, which in effect makes *maxima negligentia*, or the greatest imaginable degree of negligence, equivalent to *dolus*, or *dolo proxima*, or next door to fraud, for, *Lata culpa plane dolo comparabitur.*³

Difference between culpa in concreto and in abstracto.

In order to explain this paradox of fraud without evil intention, logicians have invented the difference between *culpa in abstracto*⁴ and *culpa in concreto*,⁵ a distinction calculated rather to confuse than enlighten, and furnishing no reasonable explanation of these two passages. The first is the blame attaching by reason of a want of the care required in the *particular circumstance* ; and the latter, the absence of the care which the *particular person* is in the habit of exhibiting.

Thibaut thinks that when the terms *culpa* and *diligentia* are used without qualification, that they are to be understood abstractedly.⁶

§ 1532.

Thibaut's view of culpa in abstracto and in concreto. The duplex division of the culpa in abstracto.

Thibaut⁷ observes that the so-called abstract blame is divisible into two degrees ; but that the Romans admitted none in the concrete.

There is, perhaps, no harm in this as a duplex division of abstract blame ; nevertheless, each individual case must be considered independently as to the shade of blame on its own merits, for if any degrees be admitted, two are either too little or too many ; hence, if adopted, they must not be looked upon as *degreui*, but as two great principal divisions, or classes of blame.

Examples of the possible degrees of culpa.

To illustrate the above axiom, let a case capable of many degrees be supposed ; in each, the degree of penalty which the defaulter will merit will vary.

B hires a barn of A at a rental ; B goes into the barn at night, suspecting robbers are plundering B's hay and corn, with an ex-

¹ P. 1, 2, 2, § 47. ² P. 50, 16, 226.

³ P. 11, 6, 1, § 1 ; Jones, l. c. 21, 22, et 14, 15 ; P. 13, 6, 5, § 2 ; P. 44, 7, 1, § 5.

⁴ I. 3, 26, § ult. ; P. 17, 2, 72.

⁵ Brückner, de culpa quæ concretive talis

dicitur, Jen. 1693 ; Runge, lig. fund. culp. in abstr. et concret. Goett. 1751.

⁶ Thib. Syst. des P. R. § 163 ; P. 13, 6, 18, pr. ; P. 13, 7, 13, § 1 ; P. 9, 2, 31.

⁷ l. c. § 164.

traordinarily secure lantern, in the most careful way, instead of watching outside to catch them, and so the barn is burned. Here the greatest diligence has been used, and the blame will be correspondingly slight.

But suppose A has *lent* the barn to B, and the same circumstances arise,—here the absence of *mutua utilitas* will render B's responsibility greater.

Again, suppose, under the same circumstances, B to use an ordinary lantern,—the blame attaching to him will increase; still more so if in addition the barn be lent, not rented.

Suppose him to go with an *unprotected light*, which *being knocked out* of his hand, the place is burned,—the blame increases; and still further if the barn be a loan.

Suppose *he set the light down to seize the thief*,—here is, again, an increase or decrease of blame, augmented still further, according to whether the barn is lent or rented.

Suppose the thief to have escaped, and that B to have set the light down in a safe place, or on a truss of hay, in a barn rented or loaned.

Suppose him to let the thieves steal the hay, and to take no notice at all.

Suppose him to be, under all the above circumstances, an unusually precise and careful man, an ordinarily careful man, a careless man, or an unusually careless man in his own matters, these supervenient facts will alter the degree of blame in every one of the fifteen variations, and so make sixty degrees. Where, then, are the shades of *culpa* to cease if degrees be insisted on?

Lata culpa is the degree of blame caused by *magna negligentia*, or defect of *exacta diligentia*: thus *lata culpa est nimia negligentia, id est non intelligere id quod omnes intelligunt*.¹ For stupidity is not to be an excuse for damaging another, *melioris conditionis ne sint stulti quam periti*.² *Quod ex culpa qua damnum sentit non intelligitur sentire*.³ *Unicuique suâ mora nocet*.⁴ *Non debet quis negligentiam suam ad alienam injuriam referre*.⁵ Thus, if a man be ignorant of what has been publicly proclaimed,⁶ and all know but himself; or if he leave doors open by night, and the like; such negligence is punishable in a degree equal to fraud in certain contracts,⁷ and in trespasses involving a pecuniary mulct, but not where the pain is corporal.

Culpa lata.
Negligentia.
Diligentia.

Culpa levis is the blame resulting from *negligentia*, or a defect in *diligentia*; such as diligent men take of their own affairs.⁸ And in such case, *imperitia*⁹ and *infirmitas culpa adnumeratur*,¹⁰ for no one should undertake what he is not capable of performing.

Culpa levis.

¹ P. 50, 16, 213, § 2.

² P. 43, 24, 4.

³ P. 50, 17, 203.

⁴ P. 50, 17, 173, § 2.

⁵ P. 2, 15, 3.

⁶ P. 14, 3, 11, § 3.

⁷ P. 16, 3, 32; P. 43, 26, 8, § 3.

⁸ P. 17, 2, 72.

⁹ P. 50, 17, 132.

¹⁰ P. 9, 2, 8, § 1.

For the like reason, *culpa est immiscere se rei ad se non pertinenti*¹—that is to say, such meddler must bear the consequences arising from his voluntary interference; but he is absolved of all blame, *culpa abest, si omnia pacta sunt quæ diligentissimus quisque observaturus fuisset*.²

In the first case, *latissima* and *lterior* must be rejected as definite degrees, and only admitted as shades of the great division of *culpa lata*; in like manner, *culpa levissima*³ must be repudiated as a definite degree of *culpa levis*, and be admitted only as an intensive expression.

We find also the expressions *exacta* and *exactissima diligentia*, *diligentia quam suis rebus adhibere solet*, *diligentia diligentis patris familias*, *diligentissimi patris familias*.

§ 1533.

Culpa in faciendo
et in non faci-
endo.

Another division supported by Donellus, but which arose before his time, is that of the *culpa in faciendo* and *in non faciendo*, misfeasance and nonfeasance, or faults of omission and of commission. An illustration may be given from the case of the *fornacarius* in the Aquilian law.⁴

A slave lights the furnace in a proper manner, and goes to sleep, committing the custody to another slave, who does no act, but letting things take their course, the villa is burned down. Held that an *actio utilis* lies against both; for the first did nothing careless, and the second did nothing at all.

There is scarcely a distinguishable difference between these two, to kill a man in anger, and not to prevent his being killed when able so to do, involves, in fact, the same moral culpability; nevertheless, it is not to be doubted but that an active murderer would be looked upon with more abhorrence far, than a passive or assentient one. To pull a man out of a river would be a meritorious act; to let him drown would be reprehensible, though not punishable. But to revert to the stoker: had he *set* the farm-house on fire, an action would lie for a *damnum injuria datum*, for *negligenter custodiens*, an *actio utilis* only against the master of the *custos*; here the *utilis* is in the first case for nonfeasance, but in neither case is there any misfeasance. But *quære*, did the stoker not undertake, impliedly, that no harm should arise from his inactivity?⁵

Nonfeasance.

Nonfeasance, in English law, is the omission by a person to do an act which he was bound to perform.

Misfeasance.

Misfeasance, the negligent performance of an act incumbent upon him; and

Malfeasance.

Malfeasance, the performance of an illegal act.

It will, however, be more convenient, having thus introduced

¹ P. 50, 17, 36.

² P. 19, 2, 25, § 7.

³ P. 9, 2, 27, § 9.

⁴ This expression is to be found only in one place in the Digest, P. 9, 2, 44.

⁵ Hasse, über die Culpa, § de lege Aquilia.

the question of *culpa*, and laid down the broad rules of distinction, to discuss under each particular contract the measure of *culpa*, whether in *faciendo* or in *non faciendo*, which properly applies to it.

§ 1534.

Now, the material question which arises upon the maxim *nemo casus præstat* evidently is, what comes strictly under the term accident; in other words, what is held to be, and what is held not to be, a *casus fortuitus*. The doctrine of the casus, fortuitus or mere accident.

To come into this category, the accident must be either utterly unforeseen, and so *inevitable*; or, though foreseen, to be nevertheless *inevitable*. Both these are usually technically called the act of God, or else they must be *irresistible*. Inevitable and irresistible accident.

That lightning should fall and burn down a barn, upon which there was a conductor, would be utterly unforeseen. The advance of the cholera from east to west is foreseen, but inevitable; or it may be irresistible, foreseen or not, such as the incursion of public enemies or robbers.

The first two are the result of *physical* causes, therefore termed *inevitable*; whereas those resulting from *human* causes are properly termed *irresistible*. Inevitable accident is the result of physical, irresistible of natural causes.

The inevitableness of accident from physical causes, such as those stated, is too obvious to need commentary.

With respect to those which are the effect of human agency, the incursion of the enemies of the State is held to be irresistible. Such are variously termed public enemies, but in England the queen's enemies; and any *casus fortuitus* or damage arising from such cause should in equity be repaired by the State, that is, by the public treasury. But the damage arising from such warfare as is acknowledged by the law of nations to be lawful,¹ is very different from that private violence unrecognised by the law both of nations and of civil society, which is termed *rapina*, or robbery by violent seizing and carrying off, practised by pirates on the high seas, and bands of marauders by land; both these *hostes humani generis* are without the pale of all law, and may be treated as outlaws or *capita lupina* in the ancient and proper acceptation of that term, on mere proof of the act of *rapina*,² defined to be *violenta ablatio rei mobilis lucri faciendi gratia*; when the thing seized is immovable, it is termed *invasio*; and both differ from *furtum*, in that this latter is not accompanied by open violence, but is performed clandestinely and by artifice, and is altogether an offence involving a minor punishment on account of its being accompanied by less injury. *Quæ fortuitis casibus accidunt, cum prævideri non potuerint (in quibus etiam aggressura latronum est) nullo bonæ fidei iudicio præstantur.*³ Rapine, then, or robbery by violence, is accounted accident from irresistible violence. Rapina.

Invasio.
Furtum.

¹ Grot. d. I. Bet. P. 3, 5, 1; 3, 18, 2; 3, 6, 2; 3, 16, 1; 3-2, 1, 11.

² I. 4, 2.

³ C. 5, 17, 11, § 1.

The actus Dei.

In the Digest, the casus fortuitus is not subdivided into physical and human in those passages which allude to the subject.

*Animalium, vero casus, mortes, quæque sine culpa accidunt, fugæ servorum qui custodiri non solent, rapinæ, tumultus, incendia, aquarum magnitudines, impetus prædonum a nullo præstantur.*¹

Vinnius's catalogue of casus fortuitus.

But Vinnius² details them, but places the physical first; and thus in a measure severs them.

Casus fortuiti varii sunt, veluti a vi ventorum, turbinum, pluviarum, grandinum, fulminum, æstus, frigoris, et similium calamitatum, quæ cælitus immittuntur; nostri vim divinam dixerunt; Græci Θεοῦ βλαβ. Item naufragia, aquarum inundationes, incendia, mortes animalium, ruinæ ædium, fundorum chasmata, incursus hostium, prædonum impetus, &c., fugæ servorum qui custodiri non solent. His adde damna omnia a privatis illata, quæ quo minus inferrentur, nullâ curâ caveri potuit. Ad casus autem fortuitos non sunt referendi illi casus, qui cum culpa conjuncti esse solent cujusmodi sunt furta.

Quamobrem qui rem furto amissam vel incendio verbi causâ servorum negligentia orto, consumptam dicit is diligentiam suam probare debet. Quod vero incendium in alienis ædibus obortum occupat ædes vicinas, aut quod fulmine excitatur, aut a grassatoribus vel incendiariis immittitur, id inter casus fortuitos numerari debet.

Quis sentiat casum and quis casum præstare debet.

Hence the question arises of who suffers the accident, *quis sentiat casum*, and who must indemnify for the accident caused by another, *quis casum præstare debet*?³ Thus, let it be supposed that an act has been promised by one party, but which he cannot perform, whereby the other party is damnified, as if a servant engaged to perform certain duties fall ill. The servant in such case bears the loss of his board and wages so long as his inability continues;⁴ but if the case be reversed, and it so happen that the master cannot on account of his own illness give the servant the opportunity of performing his contract, he must still pay him his wages and give him his board; for the impediment originates on the side of the master, not on that of the servant.

Debitor speciei liberatur interitu rei.

The rule *debitor speciei liberatur interitu rei* is constant; for if one come to an understanding with another to render him a *certain thing*,—as, for instance, to sell him a library of books in consideration of a certain act, the payment of the price, and the object perish without any fault; the act must still be performed by the first party, because of the physical impossibility to render the object. And this is true in the case of all nominate contracts; but the question may arise with respect to innominate ones, whether that which has been given by one party as the con-

¹ P. 50, 17, 23; P. 13, 6, 5, § 4.

² Ad I. 3, 15, § 2, n. 5.

³ G. Beyer, diss. ad L. 66, solut. mat. c. 2, § 9, in opusc. p. 44.

⁴ Lauterbach, coll. th. jur. tit. locat.

cond. § 105; Müller ad Struve, Ex. 44, th. 22, n. B.; Struve Rechl. Bed. 3 Th. 68 Bed.; contra, Leyser, sp. 212, med. 5; Walch, contr. p. 634, ed. 3; Weber, nat. Verb. § 102.

sideration for the performance of a certain act subsequently rendered impossible can be demanded back again;¹ and it would rather appear that this can be required, because there is a *locus pœnitentiæ* in innominate contracts.

But if one sell an object to another and retain the ownership expressly until payment of the price, and the object perish, and the purchaser become bankrupt, the seller alone is damnified.

If an object perish by mere accident, which the borrower had upon the condition of restoration, the owner must bear the loss, as in the case of a horse borrowed which has died, and the other party loses the advantage accruing from its use; here the distinction to be taken is between the liability to render and to restore.

If one receive a commission to buy aught for another at a distant place, and is robbed of it, he must bear the loss. But if one promise another to lend or hire out a certain thing to another, *commodare* or *locare*,² and such object perish by an accident, a loss accrues to both parties; the one loses his property, the other the benefit of the loan for use or hire.

It is, nevertheless, a rule that although none can bind himself, *dolum suum non præstare*, as being against public policy, he can so bind himself, *casum præstare*; that is, he can render himself liable for accident either by special or implied contract, or through the existence of an unilateral fact involving such obligation. In the first case, this resembles an insurance: thus a merchant may charter a ship, and specially undertake to pay its value if it be lost on the voyage; but this special undertaking may be implied, as in the case where goods are given to a pedlar at his request to hawk and are lost, the special bailee must indemnify the bailor the value of them.³

Lastly, as regards the unilateral fact, it may involve the obligation of indemnity for accidental damage, although it arise out of a *delictum*; for a thief must indemnify the person whom he has robbed for the value of an object stolen, which has subsequently perished by accident.

In all cases where there is *mora*, it renders the party guilty of such default answerable, and takes the question out of the category of mere accident: thus, if goods be bought deliverable forthwith, but the wharfinger who has the custody thereof make default, and his warehouse is burned in the mean time, he is chargeable.

¹ P. 10, 5, 1, § 1; conflicting with P. 12, 4, ult.; I. van Neck.

² P. 17, 1, 26, § 6; Wernher, T. 1, pr. 4, obs. 214, n. 49; Höpfner, § 761, n. 6, § 931, § 768, for various cases; vide P. 43, 16, 1, § 34-35; P. 47, 2, 46, pr.; P. 13,

1, 7, § 1; Id. 8, pr. & 16, fin.; C. 4, 8, f.; P. 6, 1, 62; P. 5, 3, 25, § 2; P. 5, 3, 40, pr.; P. 42, 14, § 11, as to inheritances; P. 6, 1, 5, § f.; Coccei, jur. contr. tit. de hæred. pet. Q. 19.

³ P. 10, 5, 17, § 1.

TITLE XIX.

Quibus modis re contrahitur Obligatio—Contractus Reales—Mutuum, under which of Fœnus and Usura Actiones—Commodatum, under which of Precarium—Depositum, under which of Sequestrum Actiones—Contractus Pignoratitius Actiones—Of the three Contractus Innominati—Contractus Æstimatorius—Contractus Permutationis—Contractus Suffragii.

§ 1535.

Contractus
reales.

REAL contracts, as has been above remarked, do not derive their denomination from any real action to which they give rise, for such accrue solely out of a *jus in re*, and a contract confers simply a personal right *jus ad rem*. The name, then, is derivable from the performance of the contract *in re*.

All real contracts arise out of *pacta nuda*, which become real contracts by the performance on one side, as in an agreement to exchange a horse against an ox, the *pactum* is changed into a *contractus realis* by the delivery of either of these animals.

Real contracts may be formular, or not so, when it may be one of these five, *emptio*, *locatio*, *societas*, *mandatum*, *emphyteusis*; in which case it is called a consensual contract, otherwise it is a *nudum pactum*, for no action arises *ex pacto de mutuo dando*; but if one party fulfill his part, it then becomes a real contract, to which an *actio mutui* belongs. The same is naturally the case with a *pactum de commodando*, *de deponendo*, *de pignore dando*.

These real contracts may be innominate, as mentioned in the preceding title, or nominate, which are *mutuum*, *commodatum*, *precarium*, *depositum*, of which the *sequestrum* is a species, and *pignus*, and are unilateral contracts. The *mutuum* is the gratuitous loan of perishable goods; *commodatum* is the gratuitous loan to use of an object; *precarium*, the gratuitous loan to use during the pleasure of the lender; *depositum*, the gratuitous care of a thing; *pignus*, a security for a debt.

§ 1536.

Derivation of
the word
mutuum.

The word *mutuum* is, by some, derived from the Sicilian word *μοῦτρον*, which is explained by the word *χάρις*; but it would appear with greater reason from the word *mutuo*,¹ to change, because one

¹ Var. de L. L. 1, 4, 36.

thing is given *in specie*, with the understanding that another thing of like value should be given back or exchanged for it ; that is to say, the expression applies where the same absolute thing is not to be returned.¹

Creditors² used to pay *numerare* loans *ex arca*, and *domo*, at home, or more usually *de mensa*, through a *trapezites*, *argentarius*, or banker taking security.³ *Ego ad forum ibo tunc enim in foro, et de mensæ scriptura magis quam ex arcâ domoque vel cista pecunia numerabatur.*⁴ It is hardly worth while to consider whether any difference was made in coined or uncoined bullion, turning upon the word *pondus*, because anciently weighed *per æs et libram*; and a coinage merely simplified this dilatory process.

Loans, how paid.

§ 1537.

Mutuum is a real contract, by which a *res fungibilis* is so given to another as to render him proprietor thereof, on condition of a return in kind of like quality and quantity.⁵ *Res fungibiles* are such things as may be counted, measured, or weighed out, so called because *una res fungitur vice alterius*; nor does it matter whether it be the same thing or one of equal value, but no *pretium affectionis* is recognised.

The mutuum consists in quantity and quality.

In *mutua*, or loans, the creditor is termed *mutuans*, the debtor *mutuarius*.

Thus much having been premised, the chief points which attract attention will be the principles by which loans are ruled.

Secondly, by whom they can be contracted.

Thirdly, the obligations arising out of them.

And lastly, the actions accruing from loans.

With reference, then, to the first proposition, a loan must be of *res fungibiles*, it must come into the actual possession of the recipient,—or if already so, be declared to be a loan :⁶ hence, a loan implies an alienation, though Salmasius⁷ tried to prove the contrary, and got into collision with the jurists of his age in consequence. The correct test is by distinguishing between *quantitas* and *corpora quæ mutuo dantur*. Now it will be at once evident that

¹ Plaut. *Asin.* 1, 3, 95; Paul. *R. S. P.* 12, 1, 2; Caius, 17.

² Hein. *A. R.* 3, 15, § 2.

³ P. 12, 1, 40.

⁴ Ter. *Adel.* 2, 4, 13.

⁵ *Mutui datio consistit in his rebus, quæ pondere, numero, mensura consistunt, quorum eorum datione possumus in creditum ire, quia (tam) in genere suo functionem recipiunt, pro solutionem quam speciei.*—Paulus, *P. 12, 1, 2, § 1*; I. Gothofr. *diss. de funct. et æqual. in mut. et in hanc legem*; Bynkershoek, *obs.* 1. 10; Idsinga, *diss. de mut. et vet. lib. obl. c.* 1, § 9, in Oelrichs *Theaus. nov. diss. Belg. v.* 1, pt. 1, p. 130, seq.

This is a very obscure passage upon which much has been written, l. 3, 15, pr.

⁶ *Qui negotia Lucii Titii procurabat, si cum a debitoribus ejus pecuniam exegisset, epistolam ad eum emisit qua significaret, certam summam ex administratione apud se esse, eamque creditam sibi se debiturum cum usuris semissibus.* Quæstum est an ex ea causa credita pecunia peti possit? Et an usuræ peti possint? Respondit non esse creditum; alioquin dicendum ex omni contractu nuda pactione pecuniam creditam fieri posse, conflicts with *P. 17, 1, 34, pr.*; Vide et *P. 121, 11, pr.*; *Id.* 1, 151.

⁷ De *usuris*, Bat. 1638; Walch, in *controv.* p. 321.

the quantity is not alienated,—in other words, the lender does not alienate the *right* to redemand the sum lent, but he does so with respect to the corporeal thing: hence Ulpian says,¹ *nummi non alienantur qui sic dantur ut recipiantur*; hence, also, the expression *res alienum, res aliena*.

§ 1538.

The *mutuum* implies an alienation of the substance; certain persons are therefore incapacitated.

The *mutuum* being the exchange of a perishable or mutable article for a right, alienation of the *corpus*, though not of the *jus*, is implied in the transaction; and wherever this occurs, those persons are incapacitated from granting loans who have not the free disposition of their property: thus infants, minors, and those judicially declared to be prodigals, have no power to lend their property; in other words, whoso is incapable of alienation is incapable of the grant of loans.

The *Scdm.* Macedonianum for the protection of minors.

For the protection of minors who were in the habit of anticipating their property by means of loans, the *Senatus Consultum Macedonianum*² was passed. *Cum inter cæteras sceleris causas Macedo quas illi natura administrabat etiam res alienum adhibuisset et sæpe materiam peccandi malis moribus præstaret, qui pecuniam, ne quid amplius diceretur, incertis nominibus crederet placere ne cui, qui filio familias mutuam pecuniam dedisset, etiam post mortem parentis ejus, cujus in potestate fuisset, actio petitioque daretur: ut scirent qui pessimo exemplo fœnerarent, nullius posse filii familias bonum nomen exspectata patris morte fieri.*³

This *Senatus Consultum*, then, deprived creditors simply of a subsequent remedy against those to whom they had lent money, as *fili families*, not in the more legitimate commercial transactions of sale, hiring, &c.; the object being solely to prevent an anticipation of property.⁴

Is autem solum Senatus Consultum offendit, qui mutuam pecuniam filio familias dedit, non qui alias contraxit, puta vendidit, locavit, vel alio modo contraxit. Nam pecuniæ datio perniciose parentibus eorum visa est. Quod ita demum erit dicendum, si fraus non Senatus Consulto sit cogitata, ut, qui credere non potuit, magis ei venderet, ut ille rei pretium haberet in mutui vicem.

§ 1539.

Bonæ and *malæ fidei* consumption.

A distinction is drawn between *bonæ* and *malæ fidei* consumption; in the first case, the debtor is under the impression that the lender had the power to grant the loan; in the latter, this is not the case. Where, then, the consumption is in good faith, the

¹ P. 46, 3, 55.

² P. 14, 6, 1, pr.

³ Ulpian, in. fr. 1, pr. D. xvi. 6; de *Senatus Consulto Macedoniano*.

⁴ In German universities no action of debt lies against a student, contracted by him while on the *matrikel*, all being con-

sidered minors and *fili familias*. The adoption of this system in the English universities would effectually cure the leprosy of credit and debt which so perniciously exists there, and which the preventive measures hitherto taken have tended to aggravate.

condictio sine causa will lie on the *actio de bene dependis*¹ for like quantity and value; where in bad faith, in addition to the above, the *actio ad exhibendum* will lie; which latter is the more advantageous form of action for the plaintiff. Where the loan has been granted by one who is not the owner, the contract is void, and the same actions apply. Where, however, the object lent is still in existence, *in specie*, the *rei vindicatio* lies for the recovery of the actual object lent. And all these remedies apply particularly to the cases of infants, minors, and prodigals.

Actions arising out of a loan transaction.

The *actio mutui*, or *condictio certi ex mutuo*, is the only action arising out of a unilateral contract or loan, and extends to the heirs of both parties for restitution of the same quantity and quality; and if this be less or the latter inferior, then the *actio lege Aquiliâ*; and in case of fraud, *actio doli* will lie.

Actio mutui
condictio certi
ex mutuo.

It may, nevertheless, happen that other unilateral circumstances may have intervened, such as prescription or consumption, which give a colorable title, in which cases the *actio mutui* applies; because, then, the condition of the action, the acquisition of the property, *ex causa mutui*, exists.²

If one party grant the money of another unilaterally as a loan to a third party, no action of vindication accrues to the owner, without a cession of action to him by the lender; and if not consumed *malæ fidei*, so as to found the action *ad exhibendum*, an *actio in factum* will only lie for the sum whereby the borrower has been advantaged.³

The borrower must, upon general principles, fairly restore⁴ whatever he may have received.

The obligation which arises out of a loan is, first, the return of the same quantity and quality as that lent; an arrangement to return less is binding, because then the surplus is held to be released; not so that to return more, for then a stipulation is required, because here the obligation originates *ex re*, and such pactum adjectum, or ancillary contract, militates against the principal contract.⁵ *Re enim non potest obligatio contrahi, nisi quatenus datum sit*:⁶ thus, neither can interest be demanded without a stipulation, as a general rule,⁷ certainly not on a *pactum adjectum*;⁸ but in these cases the contract ceases to be a *mutuum*,⁹ and becomes one of *fœnus*.¹⁰

A mutuum may be to return less, but not more.

Lastly, the borrower is only bound to restitution as regards him with whom he contracted for the loan; yet one remarkable exception to which Thibaut draws attention must be noted,—viz.,

Action for restitution lies only against the actual lender. Exception of the *condictio juveniana*.

¹ Puttman, adv. 2, 4.

² P. 12, 1, 11, § ult.; Id. 13, pr. § 1; Id. 19, § 1; Cuj. obs. 14, 3, 5; Cocceii, I. C. 14, 6, qu. 13.

³ P. 6, 1, 52; P. 19, 5, 14, § 3; contra, Voet. 12, 1, § 8.

⁴ P. 12, 1, 3; I. 3, 15, pr.

⁵ P. 2, 14, 17, pr.

⁶ Paul. R. S. P. 22, 1, 1, 3, & 4.

⁷ Exceptions are to be met with. P. 22, 1, 30, de nautico fœnore; C. 4, 32, 12, de usuris; and Nov. 136, 4.

⁸ Thib. P. R. § 546, n. e. ibique cit.

⁹ P. 19, 5, 24.

¹⁰ Hein. A. R. 3, 15, § 3.

that often termed *condictio juveniana*, in virtue whereof, he to whom the things lent belong, can sue for restitution the possessor, who believes he has received the object from another party.¹

§ 1540.

Distinction between *mutuum* and *fœnus*.

A *mutuum*, we have seen, is a loan without usury; and as soon as this rule was departed from, it was no longer called *mutuum*, but *fœnus*, which is used to signify the capital or the interest thereon indifferently;² a loan without usury more nearly resembled a *commodatum*, that without it the *locatio conductio*.

Sort is capital.

Capital was termed *sors*,³ as distinguished from *fœnus*. *Qui mihi neque fœnus, neque sortem argenti danunt*,⁴ and *Hei mihi! etiam de sorte venio in dubium miser*.⁵ Capitalised interest is represented by the expression, *sors fit ex usurâ*.⁶ *Usura*, the price of use, then, may be correctly defined to be the rent paid for the hire of capital.

Usurers held in abhorrence.

To judge from many classical passages,⁷ usurers were held in great abhorrence, nay, even practically put on a par with homicides;⁸ and it appears that while a thief was condemned in double, an usurer was condemned in quadruple damages. *Fœneratores* were otherwise called *argentarii*, and sat in the middle of the Temple of Janus, at the kalends or first of the month, to transact their banking business;⁹ it is supposed that the borrowers assembled at one statue of Janus, the creditors at another, and the lenders at a third; the interest was due at the kalends, hence the expression arose of promising to pay at the Greek Kalends.¹⁰ The book in which the sum, date, and name of the debtor was entered was termed *kalendarium*;¹¹ hence the *actio kalendarii*.

¹ Thib. l. c. Conradi de Juvent. condict. Marb. 1774; contra, Leyser, sp. 130, m. 1; P. 12, 1, 32; Glück, Pand. 12 B. § 779.

² Tacit. Ann. 6, 17, 14, 53.

³ Varr. de LL. 5, 7.

⁴ Plaut. Mostell. 3, 1, 34.

⁵ Ter. Adel. 2, 2, 45; Mart. Ep. 5, 43; P. 33, 2, 24.

⁶ Plin. in Præf. H. N.

⁷ Cic. de Off. 2, 25; Cat. de Re Rust. init.; Sen. de ben. 7, 10.

⁸ Plin. N. H. 18, 5, quid fœnerari? quid hominem occidere? But this must be understood of exorbitant interest, such as is met with among Jews in bill transactions at the present day, when Jew and usurer, in the objectionable sense of one who extorts excessive interest, are exchangeable terms. The despair of one of these usurers of the last century has been thus epigrammatized in the following cutting lines:—

“‘Oh, let me die in peace,’ Eumenes cried,
To the hard creditor at his bedside.
‘How! die!’ roared Gripus,—‘thus thy
debts evade!

No, no, you shall n’t die till I am paid.’”

And again, after the insolvent’s death:—

“His last great debt is paid—he is no more.
Last debt?—he never paid a debt before.”

M. Antonius reproaches Augustus with his descent from a grandfather who was a money-lender.—*Argentarius* Suet. Aug. 7, 10. Jews may by their own law take *usura* from strangers, but not from their brethren.—Deut. xxiii. 19, 20.

⁹ Hor. Epod. 2, 67; Ch. Sermon. 1, 3, 86.

¹⁰ *Calendæ propriæ sunt Latinorum: neque enim Græci hæc appellatione, quamvis origine Græca sit, sed alia utuntur ad denotandum primum mensis diem. Hinc Calendas Ausonias vocat Ovidius, l. Fast. v. 14. Hinc etiam de iis, qui debita nunquam solvunt, proverbio dicitur ad Calendas Græcas soluturos; quo sæpe usum Augustum, Suet. narrat in ejus vita lcccvii. Latter Lammas is the English equivalent.*

¹¹ P. 30, 1 (1), 33, § 1; Id. 39; P. 32, 1, (3), 41, § 6 & 62; P. 26, 7, 39, 14; P. 15, 1, 88; C. 4, 2, ult.

The chief differences, then, between *fænus* and *mutuum* were—

Distinction
between *fænus*
and *mutuum*.

1. That *fænus* bore usury, *mutuum* did not.
2. *Fænus* was lent with the intention of gain, *mutuum* from motives of friendship.¹
3. *Fænus* is lent till a certain fixed day, *mutuum* for the time necessary.
4. From *fænus* arises the *actio kalendarii*, from *mutuum* the *actio certi ex mutuo*.

§ 1541.

No laws, either in ancient Greece or subsequently in Rome, have undergone more changes than those relating to usury and the interest of money: in Greece it was termed *τόκος*, from *τίκτω*, to produce;² because interest is quasi the child of money, the principal or capital sum being termed *κεφάλαιον* or *ἀρχαῖον*, *δανείζω* being to take up money on interest. Money at Athens was lent either upon what we should call a promissory note or acceptance, *χειρόγραφον*, a simple acknowledgment of the parties, or secured by a deed, *συγγραφή*, so called because, executed by both parties in solemn form, and duly attested by witnesses, and deposited with a third party,³ the security might be personal by pawn or mortgage. The security on moveable property was termed *ἐνέχυρον*; that on immoveable, *ὑποθήκη* or mortgage. In Attica, pillars, *ῥοι* or *στήλαι*, were set upon mortgaged estates with the amount and the mortgagee's name inscribed upon them; but in other parts of Greece, the sum was entered in public registers.⁴ This latter and excellent system is pursued in Germany so far as regards registration, where all mortgages must be publicly registered, which is a great security to buyers; the Scotch pursue a like system; but the English adopt it only in Middlesex and York.⁵

Progressive
changes in the
law of usury in
Greece and
Rome.

§ 1542.

Bottomry bonds, *ναυτικαὶ συγγραφαὶ*, were another sort of deed for money lent on sea risks at Athens, which allowed a higher rate of interest called *τόκοι ναυτικοὶ*, for it usually included by special clauses the modern insurance, and was not demandable if the vessel were lost; but then, the places to which the vessel might go were inserted in the policy, as with us,⁶ the *ναυτικὴ συγγραφή* is

Bottomry bonds

¹ Sen. de ben, 7, 10.

² Aristotle says interest is illegal, because of the natural barrenness of money. So great a fallacy from so great a logician is remarkable.

³ Dem. c. Laer. p. 927; c. Phor. 908, 22.

⁴ Boekh. 1, 172; Wachsmuth, 11, 1, 225.

⁵ The opposition to a general system of registration is based chiefly on four grounds: —1. The expense in small transactions; 2. The publicity thus given to private affairs; 3. The virtual abrogation of the statute of uses; 4. And of limitation, by doing away

with constructive notice. Judgment debts and specialties, however, and bonds to the Crown (public accountants), are registered under 1 & 2 Vic. 110, 2 & 3 Vic. 11, 3 & 4 Vic. 82, as to Middlesex and Yorkshire; 5 Ann, 18, 6 Ann, 35, 7 Ann, 20, 8 Geo. II. 6, at the office of the Common Pleas. Deeds are generally registered in the British colonies.

⁶ The student is referred to that most classical and accurate work on the English Law of Insurance, by Mr. Joseph Arnould, of the Middle Temple.

applied to the freight, cargo, or vessel.

such a bond, mentioned in Demosthenes's speech against Lacritus. This loan might be made on the security of the cargo, *φορτίον*; freightage due for carrying the same, *ναύλον*; or the vessel itself, *ναῦς*; and the laws respecting these agreements were very severe. And here it is to be remarked, that the Greek law formed the basis of the Roman maritime code.¹

§ 1543.

Derivation of the word *fœnus* is identical with the Greek in signification.

The *As* the unit of the *usura*.

Fœnus, or *fenus*, has a like derivation :² a *fetu*, quasi a *feturâ usuræ*, and *impendium* are other terms for interest; but the word *fœnus* is always used to represent the capital bearing interest; and *usura*, in the plural, the interest on such sum.

As is the unit of interest on account of the readiness of its division into parts or rates; hence the table of the rate of interest may be thus set out with the terms applying to each rate :—

Interest table.

<i>Assis usuræ</i> ³	} 1 per ct. per month, = 12 per ct. per ann.		
<i>Centessimæ usuræ</i> ⁴			
<i>Deunces usuræ</i> ⁵		11	” ”
<i>Dextantes vel decunces usuræ</i> ⁶		10	” ”
<i>Dodrantes usuræ</i>		9	” ”
<i>Besses usuræ</i> ⁷		8	” ”
<i>Septunces usuræ</i> ⁸		7	” ”
<i>Semisses usuræ</i> ⁹		6	” ”
<i>Quincunces usuræ</i> ¹⁰		5	” ”
<i>Trientes usuræ</i> ¹¹		4	” ”
<i>Quadrantes usuræ</i> ¹²		3	” ”
<i>Sextantes usuræ</i> ¹³		2	” ”
<i>Unciæ usuræ sive fœnus unciarium</i>		1	” ”

Centessimæ asses.

Centessimæ asses meant, that the sum paid in interest in one hundred months equalled the capital; *binæ centessimæ*, therefore, was 24 per cent., *quaternæ*, 48 per cent., and so on.¹⁴

The Twelve Tables fixed (B. C. 450) the *unciarium fœnus* as the legal rate, subject to a fine of quadruple the amount if exceeded.¹⁵ The better opinion¹⁶ with respect to the amount of the *unciarium* is, that this was $\frac{1}{8}$ of the *As*, or 1 oz. in the 12, payable for the year (then) of ten months, $8\frac{1}{3}$ per cent., or 10 per cent., for that of twelve months, the year in use at the time of the decemvirs.

¹ P. 22, 2; C. 4, 33.

² Gell. 16, 12.

³ P. 12, 1, 40, Sid. Appol. Epist. 4, 24.

⁴ Persius Sat. 5, 149.

⁵ Salmassius de mod. usar. 7, 276.

⁶ Cic. Ep. ad Att. 4, 15; C. 4, 32, 27.

⁷ Salm. l. c. 277.

⁸ Plin. H. N. 14, 4, 6; P. 50, 12, 10;

P. 22, 1, 17; P. 50, 10, 5; P. 46, 3, 102, § 3; Columella, 3, 3; Sal. l. c. 281.

⁹ Pers. Sat. 5, 149; P. 22, 1, 17; P. 46, 3, 102, § 3.

¹⁰ Cic. Ep. Att. 4, 15; P. 26, 7, 7, § 10.

¹¹ P. 33, 1, 21.

¹² Tac. An. 6, 16; Liv. 7, 27.

¹³ Cic. Verr. 3, 71; Juv. Sat. 9, 6; Cic. Att. 5, 21, & 6, 1; Hor. Serm. 1, 2, 12.

¹⁴ Cato de Re Rust. præst.

¹⁵ Rein. Rom. pr. R. 304.

Versura is borrowing money at the end of the year to pay off a former creditor; *centessimæ perpetuo fœnore* is 12 per cent. simple interest; *centessimæ renovatæ*, 12 per cent. compound interest. The word *nomen* is used to signify a debt; *bonum nomen*, "a good name on a bill:" a good debt in contradistinction from a bad one; thus Shylock calls such a man a "sufficient man:" a modern money-lender would call him a "good man."

Versura.
Centessimæ asses perpetuum fœnus.
Nomen.

The disregard paid to, or evasions practised on, the law of the Twelve Tables, or the abrogation of so much of those laws as applied to usury in consequence of the scarcity of money after the Gallic War,¹ led to the introduction of the *Lex Licinia* by the tribune C. Licinius Stolo,² A. U. C. 378, for the protection of the plebs, enacting that all money that had been paid theretofore by way of interest should be deducted from the principal sum, and the balance repaid in three years by equal instalments.³

The *Lex Licinia.*

The *Lex Duillia Mænia*, introduced soon after by the tribunes M. Duillius and L. Mænius,⁴ restricted interest to the *unciarium fœnus*, shews that the law of the Twelve Tables had become obsolete:⁵ thus, fourteen years after the Licinian law, five commissioners called *mensarii* were appointed, empowered to offer money to debtors on security to the State, and to take cattle and other commodities at a fair valuation in payment, by which many debts were liquidated. Five years later the interest was reduced to *semiunciarium*, or half the former rate;⁶ and in A. U. C. 406, several usurers were punished for contravention of this law,⁷ by a fine quadruple the interest. Niebuhr tells us, that about this time, all debts were declared void; *sed quære?*

Lex Duillia Mænia.

Semiunciarium fœnus.

In A. U. C. 411, the *Lex Genucia*, introduced under the consulship of C. Martius Rutilus and Q. Servilius by L. Genucium, tribune, made the taking of interest absolutely illegal;⁸ but as this only applied to Roman citizens, it was readily evaded by granting loans in the names of *latini* and *fœderati*.⁹

Lex Genucia.

To remedy this evasion, the tribune M. Sempronius introduced a law with authority of the senate, *ut cum sociis ac nomine latino pecuniæ creditæ jus idem quod cum civibus Romanis esset*.¹⁰ Under the consulate of L. Cornelius Merula and Q. Minucius Thermus, A. U. C. 560, this was a mere extension of the *Lex Genucia* to the *latini* and *fœderati* in avoidance of fraud.

The *Lex Sempronius.*

All attempts to repress usury appear, however, to have been futile; and debtors, perhaps, renounced the benefit of the law,¹¹

Attempts to repress usury futile.

¹ Walter Ges. des R. R. § 576.

² Liv. 6, 34.

³ Ut deducto eo de capite quod usuria pernumeratum esset, id quod superasset, triennio æquis portionibus persolveretur, Liv. 6, 35. This in England is technically termed "applying the sponge."

⁴ Liv. 7, 16.

⁵ Hein. A. R. 3, 15, § 9. Or repealed, or perhaps superseded by some more recent enactment.—[K.

⁶ Tac. An. 6, 16.

⁷ Liv. 7, 28.

⁸ Præter hæc invenio apud quosdam L. Genucium, Tribunum plebis, tulisse ad populum, ne fœnerare liceret.—Tac. An. 6, 16; Liv. 7, 42. So by 5 & 6 Ed. VI. 20, repealing 37 Hen. VIII. 89, but itself repealed by 13 Ellis. 8.

⁹ Liv. 35, 7.

¹⁰ Liv. 35, 7.

¹¹ Noodt. de fœ. et usur. 2, 4, p. 269.

demonstrating the absurdity in all ages of laws restrictive of trade and commerce ; and the result appears to have been that *usura* not exceeding the *centesima* were declared legal¹ (*nauticum fœnus* excepted, which remained a matter of special contract). It appears that if more than the *centesima* had been paid, such sum could not be recovered, but went in diminution of capital, and was not recoverable as *usura*, but as money had and received, *sors indebite soluta*, by a *condictio indebiti*,² or as a penalty for delay, *mora*.

Lex Gabinia.

The *Lex Gabinia* appears³ simply to have restrained loans to provincial governors, by barring recovery ; and as far as can be collected from the numerous authorities on the subject, the legal interest remained fixed at the *centesima* up to the imperial period ; and there are even examples of that rate having been distinctly acknowledged and confirmed by *Senatus Consulta* and otherwise.⁴

§ 1544.

Justinian's revision of the financial system.

Justinian revised the whole question of interest, and fixed the *centesima* for *nauticum fœnus* ;⁵ the common interest at *semisses*, 6 per cent. ; mercantile interest at *besses*, 8 per cent. ; that of nobles, *illustres*,⁶ at *trientes*, 4 per cent. But he also made the *centesima* receivable on perishable agricultural products, prone to vary in price, such as oil, corn, &c.⁷ He allowed more than the *centesima* to be taken of agriculturists to whom corn, for instance, was lent, to-wit, the eighth part of the bushel,⁸—an exception still further extended by a later constitution,⁹ which he, however, subsequently abolished ;¹⁰ and from that time, the law of the Codex¹¹ *de usuris* was, doubtless, the law of land.

§ 1545.

Of interest claimable on contracts.

Interest is often claimed in contracts, it will be therefore well to make a few remarks concerning it as applied to them.

Interest may be regarded as a rent for the use of a certain quantity of *res fungibiles*, and is different from rent properly so called, which applies only to *res non fungibiles* ; both are, however, in the nature of *fructus civiles*, of the capital termed *sors*. Interest must be legal—in its origin,—in its measure,—in its duration.

§ 1546.

Origin of the interest.

Interest may originate either in a *pactum* or a *mora* ; be settled by *common law*, as in the case of interest paid to him who manages the affairs of another, and expends money for him ;¹² or by par-

¹ Niebuhr, 3, 64.

² Paul. R. S. 2, 15, 2 ; P. 12, 6, 26, pr. ; P. 12, 1, 40, & 42 ; P. 50, 17, 46 ; C. 4, 32, 18, & 26, § 1.

³ Vide Hein. l. c. 3, 15, 14 & 15.

⁴ Cic. Ep. ad. Att. 5, 21 ; Plut. in vit. Lucull. 20 ; P. 19, 1, 13, § 26 ; C. 4, 32, 20.

⁵ C. 4, 32, 26, § 1.

⁶ Nov. 106, 110.

⁷ C. Id. 23.

⁸ Nov. 32, 1.

⁹ Nov. 106.

¹⁰ Nov. 110.

¹¹ C. 4, 32, 26.

¹² P. 17, 1, 12, § 9 ; P. 3, 5, 19, § 4.

ticular law (*privilegium*), as when paid to minors as matter of course.¹

A contract only carries interest by the Roman law in certain cases, for a stipulation to that effect can only be inserted in contracts *stricti juris* and of loan. In *negotiis bonæ fidei*, the agreement must be simultaneously appended to the contract; and in cases of interest promised to a municipality, to an *argentarius* on the loan of corn or as *fœnus nauticum*, it can be made due on a *nudum pactum*.

Certain recognised unilateral acts will create an obligation to pay interest,—as administering to a will, the maker of which has directed interest to be paid.² A pollicitation or vow coupled with a promise of interest.³ Interest obtained by a *procurator* or *negotiorum gestor* on the money of his principal must be brought into account,⁴ also a buyer enjoying the fruits of the purchased article must pay interest on the price.⁵

Recognised unilateral acts create an obligation to pay interest.

Unrecognised unilateral acts are *mora*.⁶ Every act by which a man is deprived of the use of his money by another,⁷—by legal sequester, for instance. A manager must himself pay the interest he might have, but has neglected to realize.⁸ If a partner, mandatary, depositary, guardian, or the like, appropriates trust-moneys to his own use, he is liable to pay interest for such;⁹ the latter at 12 per cent.¹⁰

Unrecognised unilateral acts create an obligation.

§ 1547.

With respect to the measure of interest, it will be necessary to premise that the Romans paid interest by the month (as is still the case in Constantinople). As the integer, a pound of brass, or later, its representative, a piece of coined money, divided into twelve parts, or *uncia*.

Measure of the interest.

The law of the Twelve Tables allowed only 1 per cent., which, being disregarded, it has been seen how it rose to 12 per cent., and how Justinian settled different rates varying from 3 to 12 per cent.¹¹ Compound interest, *anatocismus* (*ἀνα τόκος*), or interest on the last interest, added periodically to the capital, by which means an illegal pre-agreement for compound interest, as such, was evaded, is wholly forbidden, as tending to ruin and reckless usury.

Compound interest illegal.

§ 1548.

The rule to be observed quoad the duration of interest is, that the interest can never amount to more than the principal; when it

Duration of interest.

¹ C. 4, 49, 5.

² P. 33, 1, 3, § 6.

³ P. 50, 12, 10.

⁴ P. 17, 1, 10, § 4; P. 3, 5, 19, § 4.

⁵ C. 4, 49, 13, § 20, & l. 5; P. 22, 1, 17, § 5, 43.

⁶ C. 10, 23, 1; C. 10, 72; C. 7, 54,

2; P. 22, 1, 32, pr. & 35; P. 5, 3, 20, § 11; P. 45, 1, 23 & 127.

⁷ Leyser, l. c. med. 4.

⁸ P. 3, 5, 19, § 4.

⁹ P. 22, 1, 1, § 1; P. 17, 1, 10, § 8; P. 16, 3, 28; P. 26, 7, 7, 10 & 12.

¹⁰ C. 5, 56, 2.

¹¹ § 1544, h. op.

does so, further interest ceases, whether it have been regularly paid as due, or left to accumulate; consequently a loan at 5 per cent. cannot be made to bear interest for more than twenty years. The New Constitution¹ applies to both cases, but the passage in the Codex² to the latter only, and as the Novella is not glossed, modern lawyers hold to the passage of the Codex which is so; as is the case with like passages in the Pandects³ and Codex which are not glossed. The principle on which this rule is founded is highly sophistical, but illogical and untrue, for it is held that the *accessorium* can never be greater than the *principale*; but could a female slave not bear twins?

§ 1549.

The quod
interesse results
from *lucrum*
cessans, and

damnum
emergens.

The next question for investigation is what is nearest allied to interest—that interest or benefit with respect to the thing, or its value, of which the owner may be deprived by non-payment, theft, destruction, &c., either in part or entirety, termed *lucrum cessans*; or even the damage such want may occasion him, termed *damnum emergens*, which, when combined with the former, is conveyed by the expression *id quod interest*, or the *interesse*.

If a commodity be not delivered when specified, and the price rise, damage accrues to the promisee,—to this may be added expenses in furnishing means of transport; nay, further, it may prevent the contrahent from fulfilling his contract with a third party, which may involve the payment of forfeit,⁴ the loss of a pledge sold under its value,⁵ forfeiture of an instalment, for all which the party is responsible who was the primary cause of such loss. Value may be diminished in other ways: by killing one of a team of four match horses, whereby the value of the remaining three has been deteriorated as a team,⁶ the loss of all fruits and *accessoria* is involved, also the profit which might have accrued thereon, by the want of that sum to invest profitably in other wares.⁷ It is, however, to be observed that the loss must be such as it was impossible to ward off by other means. Paulus⁸ instances slaves dying of hunger, on account of the non-delivery of corn to be had nowhere else; so with regard to profit it must be indisputable, as also the fact that the commodity was not obtainable elsewhere.⁹ In the same way are to be construed Hermogenian's¹⁰ words, where it is said that under such circumstances the plaintiff is not entitled to damages, but only to the interest,¹¹ except he can prove that he had no other money, nor was able to obtain any; in which case he can claim indemnification for special damage.

¹ Nov. 12.

² C. 6, 32, 10.

³ P. 12, 6, 26, § 1; P. 22, 1, 9, pr.;
P. 22, 2, 4, § 1; C. 6, 32, 27, 29, 30.

⁴ P. 13, 4, 2, § 8.

⁵ P. 13, 4, 2.

⁶ P. 9, 2, 22, § 1.

⁷ P. 13, 4, 2.

⁸ P. 19, 1, 21, § 3.

⁹ P. 9, 2, 29, § 3.

¹⁰ P. 18, 6, 19.

¹¹ P. 19, 1, 21, § 3; D. 13, 4, 2, § 8.

§ 1550.

Two actions apply to the "interesse," *condictio triticiaria*¹ and *de eo quod certo loco*.² In the case of a *bonæ fidei* contract, an action would lie for the interesse, which was not the case in one *stricti juris*; hence the introduction of the *actio triticiaria* by the prætor.

Actions arising out of interest transactions :—
Condictio triticiaria ;

The *condictio de eo quod certo loco* consists in an action on a promise to perform certain acts at a *certain place*; but if the plaintiff be prevented from going thither, he has no recourse till the prætor by his edict allows him to sue the defendant in his domicil, and oblige him to there make the payment, or delivery, termed the *interesse loci*. The judge, however, in assessing damage, takes into consideration any inconvenience or loss the defendant had been put to by such change of place or venue; or if he was ready to deliver when agreed, freed him entirely from the obligation.³ This action is, however, not required in *bonæ fidei* contracts, inasmuch as the action lies in the contract itself, giving the same remedy which in *stricti juris* contractibus was only obtainable by *condictione de eo quod certo loco*.⁴

de eo quod certo loco.

By the English law it is illegal to contract for more than 5 per cent. on land in England; but elsewhere the *lex loci contractus* rules the transaction on a bill of exchange or note that has more than a year to run.⁵

§ 1551.

The *commodatum* is the gratuitous bailment of a specific object for a certain fixed period, to be used for a particular purpose, and to be returned in specie. Here the *commodatum* differs from the *mutuum* in the speciality, for it is to be returned in specie, not in kind,—and secondly, in the fact of the use to which it is to be put being defined; whereas the conditions of the *mutuum* are complied with by the return of an equivalent on the expiry of the bailment, in weight, number, measure, nature, or quality.

Commodatum.

Difference between the commodatum and the mutuum consists in the specific return.

Justinian thus defines the gratuitous loan for use :—

Commodatum (cum modo datum) est contractus juris gentium, quæ res alieni ad certum usum gratis conceditur, ut finito illo usu eadem res in specie restituatur.⁶ The lender is termed *commodans*, the receiver *commodatarius*; and the loan may consist in moveable or immoveable, corporeal or incorporeal property, being one's own property or that of another.⁷

Definition of the commodatum.

The definition of the Digest does not differ in substance from that of the Institutes :—

¹ P. 13, 3.

² P. 13, 4.

³ P. 13, 4, § 1.

⁴ P. 13, 4, 7, pr. & 1.

⁵ 13 Eliz. 8, avoids all contracts where more than 8 or 10 per cent. is taken; 21 Jac. I. reduces it to 8 per cent.; 12 Car. II. 13, to 6 per cent.; 12 Anne, st. 2, 16,

to 5 per cent.; therewith 37 Hen. VIII. 89, and 5 & 6 Ed. VI. 6, 20, comprise the present law. As to bills and notes, 3 & 4 Will. IV. 98, 7; and 1 Vic. 80; and 2 & 3 Vic. 37. The Koran forbids usury.—Suras 2 & 30.

⁶ I. 3, 15, § 2.

⁷ P. 13, 6, 15.

*Commodata autem res tunc proprie intelligitur, si nullâ mercede acceptâ vel constitutâ res tibi utenda data est. Gratuitum enim debet esse commodatum. Is, cui res aliqua utenda datur, id est commodatur, re obligatur.*¹

§ 1552.

Requirements
of a commo-
datum.

A commodatum must fulfil six requirements :—

Firstly, There must be a thing to be lent.

Secondly, A capacity to lend the thing.

Thirdly, It must be lent gratuitously.

Fourthly, To be used by the borrower.

Fifthly, For the purpose for which bailed.

Sixthly, And be specifically returned on the determination of the bailment.

§ 1553.

There must be
a thing lent.

Firstly, There must be a thing lent, which may be either moveable, immoveable, or even incorporeal,² and be neither deposited, sold, nor intrusted to the bailee, for the sole benefit of the *commodans* or bailor, but for that also of the bailee or *commodatarius*.

§ 1554.

Property in the
object.

Capacity to lend.

The commodant must have at least a special or qualified property in the thing accommodated, or at least lawful possession of it.³ *Commodare possumus alienam rem, quam possidemus, tametsi scientes alienam possidemus*;⁴ nay, even a thief may make a valid *commodatum* of a thing stolen, which the commodatary must return, as though the bailor were a *bonæ fidei possessor*. If the bailor have a special property in the object, he may lend it to the general owner; nor does this militate against the rule *commodatum rei suæ esse non potest*, because it may be for a particular or temporary use, which is sufficient to found the contract of loan with the accessorial contract to restore.⁵

Commodatary
has no lien.

The commodatary has no ownership, but a mere possessory interest, and possesses only quâ the agent of the commodant. *Rei commodatæ et possessionem et proprietatem retinemus; nemo enim commodando rem facit ejus cui commodat.*⁶ Hence the commodant can recover against a third party, who has converted his property in the possession of the commodatary.

The commodatary has no lien for debt on a thing lent, *prætextu debiti restitutio commodati non probabiliter recusatur*,⁷ for then it would become a pledge; and a *commodatum* differs essentially from a pawn in this,—that the former is lent for use, the latter must not be used except under most special circumstances.

All persons having a legal capacity to contract, may enter into

¹ P. 13, 6, 1; P. 13, 6, 17, § 3.

² P. 13, 6, 1, § 1; Ayliffe, Pand. B. 4, tit. 16, p. 517; Poth. Pret. à usage, n. 2 & 14; Domat. B. 1, tit. 5, § 1, art. 5; Poth. Pand. 13, 6, 1, § 1.

³ Domat. 1, 5, § 1, art. 7; Poth. Pret. à us. n. 18.

⁴ P. 13, 6, 15, & 16.

⁵ Poth. l. c. n. 19.

⁶ P. 15, 6, 8, & 9.

⁷ C. 4, 23, 4.

this obligation. Thus, married women are incapacitated ; though in respect of the latter, if their husbands consent, they are bound in law, not the wife, who has in fact contracted.

Capacity of persons to accommodate.

Minors may avoid the contract at their option, for it is not ipso facto void.

Minors.

Lunatics have no power to enter into this contract. And with respect to its innate nature, it must not be tainted with any inherent vice or illegality, for it must not be contrary to morality or general law.

Lunatics.

§ 1555.

Thirdly, The object must be lent gratuitously ; for this contract ceases to be gratuitous, if any alternate lending take place,—as the loan of a cart on the one hand, and of a horse on the other—and so ceases to be a commodatum, and becomes a contract for hire.¹

The contract is gratuitous.

The *commodatum* was changed in its nature, by a remuneration being paid for use. The benefit is one-sided,—viz., on that of the *commodatarius* ; but the *property* does not pass to him as in a *mutuum*, he having only the right to *use* the thing in the way prescribed, and not otherwise, to do which would be a *furtum usus*.

Remuneration must be neither given

The *commodatum* ceases to be such on a reward being promised ; nevertheless, a *honorarium* may be given after the use has been had. Such *honorarium* may either be a free gift given out of gratitude for the use of the thing, or a reward due for such service which, therefore, is not valued, and given as an equivalent, but as a proof of acknowledgment. In speaking of *operæ liberales*, the reward is termed *honorarium* ; but in the case of *operæ illiberales*, the compensation is termed *merx*.

nor promised.

§ 1556.

Fourthly, The *commodatum* must be lent for the use of the *commodatarius* or bailee. Nor is it material that the use be exactly appropriate to the thing lent, as of a bed to sleep upon, or of a horse to ride ; for it will not be the less a *commodatum* because lent to another to pledge, as a security for his own benefit.² But in this latter case it is converted into a mandate, if the lender, at the request of the bailee, *directly* pledge the property to a creditor of the borrower, as a security for the debt of this latter.

Must be for the use of the bailee.

The borrower must use the thing according to the contract, and reasonably, otherwise he is guilty of a *furtum* : thus, *Qui jumenta sibi commodata longius duxerit alienave re invito domino*, usus sit, *furtum facit* ;³ hence the obligation to restore it in a proper condition,⁴ because the loan is gratuitous. *Exactissimam diligentiam*

Nature of use.

¹ P. 19, 5, 17, § 3 ; Poth. Pret. à usage, n. 2, 3, 11.

² P. 47, 2, 40 ; P. 13, 6, 5, § 8 ; Poth. l. c. n. 22.

³ P. 13, 5, 5, § 12 ; Poth. Pret. à us. n. 2, 5 ; Domat. 1, 5, § 1, art. 6.

⁴ Domat. 1, 5, § 2, art. 1 ; Poth. l. c. n. 23.

Præstatio culpæ. *custodiendæ rei præstare compellitur; nec sufficit eo eandem diligentiam adhibere, quam suis rebus adhibet, si alius diligentior custodiri poterit.*¹ *In rebus commodatis talis diligentia præstanda est, qualem quisque diligentissimus pater familias adhibet; ita ut tantum eos casus non præstet quibus resisti non potest.*²

Culpa and casus may be insured.

But anything short of *dolus* may be specially contracted for. *Interdum plane dolum solum in re commodatâ, qui rogavit præstabit, ut puta, si quis ita convenit.*³ Where, however, there is a mutuality of benefit, then, by the general rule, a common degree of diligence alone is required;⁴ and this applies as well to accessory things as to the principal object.

The commodant prescribes the mode of use.

The commodant prescribes the mode of use:—*Sicuti autem voluntatis et officii magis quam necessitatis est, commodare, ita modum commodati, finemque præscribere, ejus est, qui beneficium tribuit.*⁵ Hence any breach of such as could be fairly inferred to be the terms of the contract, subjects the commodatary to pay indemnity even through the result of mere accident: if such be referable to, or arise out of, the breach during the bailment, the expenses fall on the commodatary, *cibarium impensæ, naturali scilicet ratum, ad eum pertinent, qui utendum accepisset*;⁶ but this does not include extraordinary expenses, such as curing the beast of a disease arising in the course of nature.

§ 1557.

Thing must be used for the purpose for which lent. General rules of responsibility. Mutua utilitas.

Fifthly, The thing lent must be used for the purpose for which it was borrowed; for otherwise the bailee is answerable for all chances,⁷ inevitable though they be;⁸ but not for wear and tear⁹ in the service for which it may have been lent,—as in the case of a horse borrowed to go to a particular place. Any case which involves a *culpa* is, however, different: thus, the commodatary answers for all neglect, however slight, and must make amends for damage, the contract being for his sole benefit. But if the thing be lent for the advantage of the commodant,¹⁰ as in the case of a horse lent to attend the lender on a journey, or the like, then the borrower is liable for *dolus* or *culpa lata* only, not for any inferior degree of negligence; for the loan is of as much benefit to the commodant as to the commodatary,—in other words, there must be a *mutua utilitas*: hence the borrower ought not to be liable if he have taken the same care of the thing borrowed as he would of his own property in like case, technically termed *diligentia quam in suis*.

Common interest.

Now, if the commodant and borrower jointly invite a common friend to supper, one undertaking to manage the party, and the

¹ P. 44, 7, 1, § 4.

² P. 13, 6, 18.

³ P. 13, 6, 5, § 10; Poth. l. c. n. 51, 60.

⁴ P. 13, 6, 18; Poth. l. c. n. 50, 51; Id. Pand. 13, 6, 17; Jones on Bailm. 72; Ayliffe, Pand. 4, 16, p. 517.

⁵ P. 13, 6, 17, § 3.

⁶ P. 13, 6, 18, § 2.

⁷ P. 13, 6, 5, 8.

⁸ P. 13, 6, 18.

⁹ P. 13, 6, 5, § 7; P. 13, 6, 23.

¹⁰ P. 13, 6, 5, § 10.

plate be stolen which the other lent for the entertainment, such manager is chargeable to the extent of very slight blame only, or for nothing under gross negligence ;¹ but this is strictly no *commodatum*, but an innominate contract. Indeed, if a fire happen in a house, the owner is bound to save borrowed goods even before² his own.

Although the borrower must defray all expenses incidental to the use of the thing in question, such as feeding or shoeing a horse, &c., yet he is not answerable for extraordinary expenses, which might, indeed, in many cases, exceed the cost of hiring a like object. Thus, the borrower, though obliged to cure, in a horse lent him, the distemper arising since the loan was effected, can, nevertheless, be by no means called upon to cure a disease of old standing,³ or one arising from the negligence of the lender. Lastly, what is lent cannot be retained as a set-off for a debt.⁴ As regards the borrower, he is confined to the use expressly or tacitly agreed to by the lender, which cannot lawfully be exceeded ; moreover, the use must be limited in point of time.

Ordinary and extraordinary expenses.

The commodatary is not responsible for *vis major*, for *Is vero, qui utendum accepit, nisi majore casu, cui humana infirmitas resistere non potest, veluti incendio, ruina, naufragio, quam accepit, amisit securus est* ;⁵ and this must be held to comprise all those accidents before set out,⁶ where no blame can be attached to the bailee, because *et in majoribus casibus, si culpa ejus interveniat tenetur*,⁷—that is to say, if he do not exhibit the diligence which may be reasonably expected from an ordinarily prudent man—such as venturing with the property within the range of the skirmishers of a hostile army, and the like. Thus, a thing lent must be used at proper times, and in proper places, in a reasonable and prudent manner ; if, however, the commodatary be *forced*, by circumstances over which he has no control, to expose the thing bailed to him, the accident will be fortuitous, and he will be exonerated from blame. To conceal the risk to which the object may be exposed, involves not only *culpa*, but *dolus*.

The commodatary is not answerable for the casus fortuitus.

The following passage of the Roman law has exercised the ingenuity of commentators :—*Si incendio vel ruina aliquid contigit, vel aliquod damnum fatale non tenebitur ; nisi forte quum possit res commodatas salvas facere, suas prætulit*.⁸ This must be thus understood to imply, that if the fire be so sudden and violent that the commodatary seize the first valuable which comes to hand, and which turns out to be his own, he is excused ; for the words are *quum possit*. If he have just time for selection, and there are two similar objects, his own of *greater* value, and

¹ P. 13, 6, 18.

² P. 13, 6, 5, § 4.

³ P. 13, 6, 5, § 4 ; P. 13, 6, 18, § 1.

⁴ C. 4, 23, 4.

⁵ P. 44, 7, 1, § 4.

⁶ § 1534, h. op.

⁷ P. 44, 7, 1, § 2 ; P. 12, 1, 1, § 2 ; Poth. Pand. 12, 1, n. 19.

⁸ P. 13, 6, 5, § 4.

that of a commodant of *less* value, he must save the article bailed to him in preference, or pay its value.¹ But what does this all amount to? If his own be worth one hundred, and the bailed article fifty, he is clearly a gainer by saving his own property and paying for that lent or lost. But this is not a pure case of *casus fortuitus*, for the bailee has an option in his salvation; it, therefore, is more properly a question of diligence or negligence.²

§ 1558.

Bailee not liable for deterioration caused by a third party.

Deterioration arising from the act of a third party, over which the commodatary has no control, does not render him in any way liable, for this is accounted a *vis major*: thus *ad eos qui servandum aliquid conducunt, aut utendum accipiunt, damnum injuriâ datum ab alio datum non pertinere procul dubio est. Quâ enim curâ aut diligentia consequi possumus, ne aliquis damnum nobis injuriâ det*; ³ otherwise the commodant is liable for the damage. *Si reddita quidem sit res commodata, sed deterior reddita, quæ deterior facta redditur, nisi quod interest, præstetur. Proprie enim dicitur res non reddita, quæ deterior reddita.*⁴ It must, however, be understood that such wear and tear as is necessarily incidental to the use is allowed.

Where the object has been lost, and the price paid.

If the commodatary lose an object to him bailed, and pay its value, and the thing afterwards be restored to the commodant, the value must be refunded. *Rem commodatum perdidit et pro eâ pretium dedi, deinde res in potestate tuâ venit; Labeo ait, contrario judicio aut rem mihi præstare te debere, aut, quod a me accepisti reddere.*⁵

Onus probandi is on the commodatary.

The burden of the proof of such loss or deterioration lies negatively on the commodatary, for *in exceptionibus dicendum est reum partibus actoris fungi oportere, ipsumque exceptionem, veluti intentionem implere*⁶ (*id est probare debet*); hence the commodatary must shew, positively, he has used due diligence, or negatively, that he has not been careless.

§ 1559.

Commodatum æstimatum.

Another disputed passage refers to valued loans. *Si forte res æstimata data sit, omne periculum præstandum ab eo qui æstimationem se præstiturum recepit.*⁷ *Æstimatio autem periculum facit ejus qui suscepit.*⁸ The effect which the estimation has upon a loan for use, is clearly the same as a special undertaking, to hold

¹ Vide Jones, l. c. 69, 70; Poth. Pret. à us. n. 56; Story, Bail. § 245.

² Story, l. c. § 251, puts the case of two shipwrecked persons on one plank, sufficient to save one, but not both. Is the one to leave go that the other may be saved?

³ P. 13, 6, 19.

⁴ P. 13, 6, 3, § 1.

⁵ P. 13, 6, 17, § 5.

⁶ P. 22, 3, 19; Poth. obl. n. 656.

⁷ P. 19, 3, 1, § 1; Poth. l. c. n. 62, thinks the borrower not liable for accidents.

⁸ P. 13, 6, 5, § 3.

harmless in case of accident. This case, then, is one of a qualified commodatum, partaking of the nature of a *mutuum*; it allows the alternative of returning the object, or its value if lost; and it is erroneous to suppose that the fact of estimation renders the commodatary responsible, *per se*. This, therefore, should rather be termed a *commodatum qualificatum*.¹

Sixthly, The object lent must, at the termination of the bailment, be returned to the bailee in specie, which is one of the principal points wherein it differs from a *mutuum*, for *non potest commodari id quod usu consumitur nisi forte ad pompam vel ostentationem quis accipiat*,² as pictures to be hung up in a gallery.

The loan must be returned specifically.

The grant of an accommodation is entirely at the discretion of the commodant; but when once granted, the commodatary has a right to due notice of withdrawal. *Cum autem id fecit, id est, postquam commodavit, tunc finem præscribere, et retro agere, atque intempestive usum commodatæ rei auferre, non officium tantum impedit, sed et suscepta obligatio inter dandum accipiendumque. Adjuvare quippe nos, non decipi beneficio oportet*.³ The object is, that either party should suffer as little damage as possible; hence if the purpose for which the thing was lent has been fulfilled, it should be returned, though the term be not expired; otherwise, if not so, *in omnibus æquitas est spectanda*.⁴

Duration of accommodation.

In returning the object, the accessories follow the principal; hence no increment of whatsoever nature can be retained by the commodatary, for as he has no *dominium* in the principal, so he can have none in the *accessorium*. *In deposito et commodato fructus quoque præstandi sunt*; and this rule is of strict application, whether an animal have been lent or a capital sum for the purpose of pledge,—the young of the one, and the income arising from the other, must be rendered to the commodant.

Accessory things also returnable.

Return to the authorised agent of the commodant is equivalent to restitution to the owner, *commodatam rem missus qui repeteret, cum recepisset, aufugit. Si dominus ei dari jusserat, domino perit*.⁵

To principal or agent.

The place at which the object is to be returned is left to the discretion of the judge, *si ut certo loco vel tempore reddatur commodatum, convenit officio judicis inest ut rationem loci vel temporis habeat*.⁷ Common reason points out that the object must be returned at the place it was taken from, for it is personal, and follows the person; but if the commodant have changed his domicile, which the commodatary well knows, then there, if equally convenient; but if the commodatary have gone far away, the judge uses his discretion in imposing or not upon the bor-

Place of return.

¹ PK The Code Civil follows this principle, art. 1833. This view appears to have escaped Story, l. c. § 253, and other commentators. The *dos æstimata* is ruled by the same law.

² P. 44, 7, 1, § 2; P. 12, 1, 1, § 2; Poth. Pand. 12, 1, n. 19.

³ P. 13, 6, 17, § 3.

⁴ P. 50, 17, 90, § 183.

⁵ P. 22, 1, 28, § 1.

⁶ P. 13, 6, 12, § 1.

⁷ P. 13, 6, 5.

rower, an inconvenience not contemplated by him at the time of contract entered into.

§ 1560.

Obligations of
the commodant.

The commodant has, likewise, obligations to perform corresponding conversely with those of the commodatary, thus he must allow quiet enjoyment according to the terms of the contract, and not use the thing commodated unnecessarily, *per se hæredemque suum non fieri, quo minus commodatorio uti liceat*,¹ or he subjects himself to an action for damages.² Moreover, the warranty of the quality of the object bailed goes so far as to protect the commodatary from damage, for he accepts it to be thereby benefited, not damaged, and it is a breach of good faith to deceive him. *Qui sciens vasa vitiosa commodavit, si ibi infusum vinum vel oleum corruptum effusumve, condemnandum eo nomine est*.³

§ 1561.

Actio commodati directa et contraria.

But of these transactions, being *contractus bilaterales inæquales*, two sorts of actions may arise,—one by the *commodans*, termed *actio commodati directa*; and one by the *commodatarius*, termed *actio commodati contraria*. Now, in the case of the commodant,⁴ bringing against the commodatary an action for neglect in the using or for misusing⁵ the thing bailed, he claims specific delivery of such thing, with the profits that may have accrued thereon, and indemnification for a slight degree even of neglect; *a fortiori*, if the thing be spoiled; and if it be wholly lost by fault of the commodatary, he must then restore the value. On the other hand, the borrower may sue the lender for damage accruing by reason of extraordinary expenses⁶ incurred on account of some innate vice or defect in the thing lent, wittingly concealed by the lender, whereby damage has accrued, as by a kicking horse or thieving slave;⁷ which, in fact, involves a *culpa lata*, and enables the commodatary to exercise the right of retention till his claim be satisfied. The commodant is also liable for damage accruing from the thing being recalled too soon.

§ 1562.

Precarium is a
loan at will.

Differing from a *commodatum* is a *precarium*, which Story aptly terms a bailment at will. A precarious resembles an ordinary commodate in all respects but one, that of being redemandable at the will of the borrower; the importance of which qualification has already been seen.⁸ *Precarium est quod precibus petenti utendum conceditur tamdiu, quamdiu is, qui concepit patitur*, which

¹ P. 13, 6, 17, § 3.

² P. 13, 6, 5, § 8.

³ P. 13, 6, 18, § 3.

⁴ P. 13, 6, 5, § 8.

⁵ P. 13, 6, 17, 3.

⁶ P. 13, 6, 18, § 12.

⁷ P. 13, 6, 22.

⁸ § 1559, h. op.

is thus explained as differing from a gift. *Qui precario concedit, sic dat quasi tunc recepturus, cum sibi libuerit precarium solvere.*¹

A precarious accommodation may be of things corporeal or incorporeal,² mobile or immobile:³ thus an easement, such as a *stillicidium*,⁴ or the like, may be granted precariously.

May be corporeal or incorporeal hereditaments, moveable or immoveable.

The *precarium* may be granted personally among presentees, or by letter or message, as between absentees.⁵

§ 1563.

A *precarium* accrues to the principal by the act of his agent duly authorized, or by the operation of the law, as in the case of adoption,⁶ procuration,⁷ mandate, or through a *filius familias*, slave, or the like; but if without authority, in the first class of cases, an *actio de in rem verso* lies; but in the latter it accrues by implication, and if it be without authority, the *peculium* is liable.⁸

Accrues through another.

The *filius fam. servus*.

A *precarium* may be granted by attorney; in like manner,⁹ the pupill obtains precarious possession without his tutor's authority,¹⁰ and under like conditions, as it is received.

By attorney.

The owner may grant a precarious accommodation of a thing then not actually in his possession;¹¹ but none can be the precarious commodatary of his own property;¹² nor can two persons possess precariously *in solidum*.¹³

Cannot be in solidum.

§ 1564.

The commodant is liable for the slightest degree of negligence; the bailee of a *precarium* for *culpa lata quæ dolo comparabitur* only, because he is liable at any moment to be deprived of the use of the object, and is therefore in a less advantageous position than he who holds for a certain fixed time; and cannot therefore provide against the withdrawal of the object.¹⁴ *Eum quoque precario teneri voluit prætor, qui dolo fecit, ut habere desinerit. Illud annotatur, quod culpam non præstatis, qui precario rogavit, sed solum dolum præstat, quanquam is qui commodatum suscepit, non tantum dolum sed etiam culpam præstat. Nec immerito, dolum solum præstatis, qui precario rogavit, quum totum hoc ex liberalitate descendit ejus, qui precario concessit.*¹⁵

Præstatio culpæ.

The reason given in this passage of Ulpian is, certainly, far from being satisfactory. In England, all gratuitous loans are treated as precarious.

¹ P. 43, 26, 1, pr. & § 2; Story, l. c. § 227, *ibiq.* cit.

² P. 43, 25, 2, § 3 & 4.

³ P. 43, 26, 6, § 2.

⁴ P. 43, 26, § 3.

⁵ Id. 9.

⁶ Id. 16.

⁷ Id. 6, § 1.

⁸ Id.

⁹ Id. 12, § 1.

¹⁰ Id. 19.

¹¹ Id. 18.

¹² Id. 6, § 4, & Id. 4, § 3.

¹³ Id. 19, pr.

¹⁴ P. 43, 16, 8, § 3.

§ 1565.

Depositum a real contract to keep gratuitously, and restore on request.

The next species of real contract is a *depositum*, whereby the depositary undertakes to safely keep the deponent's property without remuneration for his trouble, and to re-deliver the object to the deponent on request.

A *depositum* is sometimes termed a *commendatum* for *commendare nihil aliud est, quam deponere*.¹

*Depositum*² est contractus juris gentium, quo res alicui gratis custodienda relinquitur, ut eadem deponenti, quodcumque illi lubuerit, restitatur.

The depositum regulare and irregulare,

A depositum is termed *regulare* in all common cases; but in those in which the use of the deposit is tacitly permitted to the depositary, as in the case of money left unsealed, it is termed *irregulare*; ³ and is, strictly speaking, no *depositum*, but rather a *mutuum*.

necessarium, miserabile, voluntarium, simplex;

Deposita were *necessaria*, otherwise *miserabilia*; or *voluntaria*, otherwise *simplicia*. In the first, the faithless depositor was punished like a thief if he denied the deposit, because it was not in the power of the depositor to make choice in a time of war, inundation, fire, shipwreck, or other sudden calamity of the person he would otherwise have preferred to trust; therefore, less blame attaches to him on account of the pressing nature of his necessity.

and consists in moveables.

This is a gratuitous contract in which the depositor is termed *deponens*, and the receiver *depositarius*; the object of it consists in moveables, although some think in immoveables, for this has been doubted; ⁴ and it is true that in the Roman law there is no trace of the *depositum rei immobilis*, for this would be rather a *mandatum*; besides, the *depositarius* is answerable for *culpa lata*; the *mandatarius* for *culpa levis* only.

Leading features of this contract.

The gist of this contract consists in the absence of remuneration—in the depositor not parting with the property, *rei depositæ proprietates apud deponentem manet sed et possessio, nisi apud sequestrem deposita est*—in the right of use not being conferred, consequently, all the *onus* lies on the *depositarius*; all the advantage on the deponent. Remuneration would convert it into a hiring, parting with the property into a sale, and the right of use into a *commendatum*: thus the using a *depositum* is looked upon as a breach of contract equal to theft; ⁵ making away with a deposit subjects the depositary to a mulct of double the value by a prætorian award.⁶ *Si quidem qui rem depositam invito domino sciens prudensque in usus suos converterit etiam furti delicto succedit*.⁷

¹ P. 50, 16, 186.

² P. 16, 3, 1; I. 3, 15, 3.

³ P. 16, 3, 25, § 1.

⁴ Schulting, thes. contr. dec. 58, th.

1; Huber, in prælect ad Pand. tit. depos. num. 1; Thomasius, in schol.

⁵ I. 4, 1, 6.

⁶ P. 16, 3, 1, 1.

⁷ C. 4, 34, 3; P. 16, 3, 29.

The decemviral law imposed a penalty of double the value of a deposit upon him who had fraudulently converted it to his own use. *Si quid endo deposito dolo malo factum escit duplione luito.*¹ For a fraudulent depositary was looked upon in the light of a thief;² indeed the breach of trust so venial in England, was, in ancient Greece and Rome, a crime of deep dye.

Penalty of the decemviral law for breach of deposit.

*Spartano cuidam respondit Pythia vates :
Haud impunitum quondam fore, quod dubitaret
Depositum retinere et fraudem jure tueri
Furando. Quærebat enim quæ numinis esset
Mens, et an hoc illi facinus suaderet Apollo?
Reddidit ergo metu, non moribus ; et tamen omnem
Vocem adyti dignam templo veramque probavit
Exstinctus tota pariter cum prole domoque.*³

This is evidently a translation of the response of the Delphic Oracle to Glaucus, who asked if he might, by a false oath, retain a deposit committed to his care.

Γλαῦκ ἐπικύδειδῃ, τὸ μὲν ἀντίκα κέρδιον οὕτω,
Ὅρκῳ νικῆσαι καὶ χρήματα ληίσσασθαι.
Ὅμνυ· ἐπεὶ θανατός γε καὶ εὐορκον μένει ἄνδρα.
Ἀλλ' ὅρκου παῖς ἐστὶν ἀνώνυμος, οὐδ' ἐπὶ χεῖρες,
Οὐδὲ πόδες· κραιπνὸς δὲ μετέρχεται, εἰσόκε πᾶσαν
Συμμάρφας ὀλέσῃ γενεὴν καὶ δίκον ἅπαντα.
Ἀνδρός δ' εὐορκον γενεὴ μετόπισθεν ἀμείνων.⁴

Juvenal,⁵ intending evidently to put a strong case of dishonesty, in describing the depravity of the manners of his day, says :—

*Nunc si depositum non inficietur amicus,
Si reddat veterum cum totâ ærugine follem,
Prodigiosa fides.*

Sir William Jones⁶ cites the elegant maxim of an Arabian poet cotemporary with Justinian, to the effect that “ Life and wealth are only *deposited* with us by the Creator, and like *all other deposits*, must in due time be restored.”

The prætor, however, drew an equitable distinction between the common deposit and that termed *miserabile* ; but if the goods be assumed by a friend to prevent their destruction, liability for fraud only obtains. *Nam si affectione coactus ne bona mea distrahantur, negotiis te meis obtuleris ; æquissimum esse dolum duntaxat te præstare.*⁷

*Quod neque tumultus, neque incendii, neque ruinæ neque naufragii
caussa depositum sit in simplum ex earum autem rerum quæ supra*

¹ Goth. ad LL. xii. 77, No. 3.

² P. 16, 3, 29 ; C. 4, 34, 3.

³ Juv. Sat. 13, 199.

⁴ Herod. 6, 86.

⁵ Juv. Sat. 13, 61.

⁶ Bailm. p. 52.

⁷ P. 3, 5, 3, § 9 ; Poth. Pand. 3, 5, n. 52.

⁸ P. 16, 3, 18.

comprehensæ sunt, in ipsum in duplum, in heredem ejus quod dolo malo ejus factum esse dicetur qui mortuus sit, in simplum; quod ipsius, in duplum judicium dabo. And he is declared to be infamous, *Qui depositi, suo nomine non contrario judicio damnatus erit.*

§ 1566.

The præstatio
culpæ in de-
positis.

Now, generally speaking, as the whole benefit, *utilitas*, accrues to the deponent, the *culpa* applying to the *depositarius* is of the slightest description; but, on the other hand, that which applies to the deponent, is *lata*. Yet particular cases may arise: for instance, as when the depositary accepts the deposit out of mere compassion, such being termed a *depositum miserabile*; his neglect will, in such case, be overlooked.

The depositary must take the same care of the property bailed to him as of his own.

*Nam etsi quis non ad eum modum quem hominum natura desiderat, diligens est, nisi tamen ad suum modum curam in deposito præstat, fraude non caret.*¹ *Num enim salvâ fide minorem iis, quam suis rebus, diligentiam præstabit. Sed is ex eo solo tenetur, si quid dolo commiserit. Culpæ autem nomine, id est, desidiæ ac negligentiae, non tenetur. Itaque securus est, qui parum diligenter custoditam rem furto amiserit; quia qui negligenti amico rem custodiendam tradit, non eo sed suæ facilitati id imputare debet.*

Thus the depositary was not made responsible for any loss which did not carry with it a fair presumption of fraud.

Of course the depositary may voluntarily assume the responsibility, as in all other bailments. *Sed etsi se quis deposito obtulit (idem Julianus scribit) periculo se depositi illigasse; ita tamen, ut non solum dolum sed etiam culpam et custodiam præstet; non tamen casus fortuitos.*²

Inasmuch, too, as the property remains in the deponent, he must bear the consequences of inevitable accident, except, of course, in irregular deposits; but if the depositary delay to deliver up the deposit on demand, he renders himself liable for it in like manner as if he had agreed specially to insure the deponent against accident.

If the deposit belong to many owners, it ought to be redelivered in the presence of all such parties, if indivisible; otherwise, if divisible.³ But if one have received his portion, and the depositary become insolvent, such party is not compellable to divide such part among his co-depositors, for the loss arose from their own neglect.⁴ *Si apud duos sit deposita res adversus unumquemque eorum agi potuit. Nec liberabitur alter si cum altero agatur. Non enim electione sed solutione liberantur.*⁵ The depositary need not return the thing

¹ P. 16, 3, 32; I. 3, 15, § 3.

² P. 16, 3, 1, § 35.

³ P. 16, 3, 1, § 36; P. 16, 3, 14; Jones, Bailm. 2nd ed. 1798, p. 51.

⁴ C. 4, 34, 12. ⁵ P. 16, 3, 1, § 43.

to other than the real owner. But if a thief deposit a thing, the depositary must retain possession till the title thereto be established; ¹ but if the claim be open to no suspicion, the object must be returned to the depositor without regard to his title,²—nay, not only the deposit, but the mean profits which have accrued³ since it may have been in his custody.

*Quod si ego ad petenda ea non veniam nihilominus ei restituenda sunt qui deposuit quamvis maliqu æsta deposuit.*⁴ The remedy extends against heirs.

*Si deposuero apud te, ut post mortem tuam reddas; et tecum et cum hærede tuo possum depositi agere. Possum enim mutare voluntatem et ante mortem tuam depositum repetere.*⁵

Such return, moreover, ought to take place at the same place⁶ where it was first delivered to him.

*Depositum eo loco restitui debet in quo sine dolo ejus est apud quem depositum est; ubi vero depositum est nihil interest.*⁷

Fraud cannot be condoned, for *Si rem depositam vendidisti, eamque postea redemisti, in causam depositi etiam si sine dolo malo postea perierit teneri depositi, quia semel dolo fecisti cum venderes.*

§ 1567.

Before quitting this subject we must refer to the luminous disquisition on the responsibility of bail, and claims of the bailor, by Sir William Jones.⁸ Sir William Jones's view of deposits.

“The most ancient case that I can find in our books on the doctrine of deposits (there were others indeed a few years earlier, which turned on points of pleading), was adjudged in 8 Ed. II., and is abridged by Fitzherbert.⁹ It may be called Bonion's case, from the name of the plaintiff, and was in substance this:—An action of detinue was brought for *seals, plate, and jewels*, and the defendant pleaded ‘That the plaintiff had bailed to him a chest *to be kept*, which chest was *locked*; that the bailor himself took away the key *without informing the bailee of the contents*; that robbers came in the *night*, *broke open the defendant's chamber*, and carried off the chest into the fields, where they forced the lock, and took out the *contents*; that the defendant was robbed at the same time of his own goods.’

“The plaintiff replied:—

“‘That the jewels were delivered in a chest *not locked*, to be restored at the pleasure of the bailor.’

“And on this, it is said, *issue was joined*.

“Upon this case Lord Holt observes:—

“‘That he cannot see why the bailee should not be charged

¹ P. 16, 3, 1, § 36; P. 16, 3, 14.

² P. 16, 3, 11.

³ P. 16, 3, 1, § 25.

⁴ P. 16, 3, 31, § 1.

⁵ P. 16, 3, 1, § 45.

⁶ P. 16, 3, 12.

⁷ P. 16, 3, 12, § 1.

⁸ P. 36, Ed. 1798.

⁹ Mayn. Ed. II. 275; Fitz. Abr. tit. Detinue, 59.

with goods *in* a chest, as well as with goods *out of* a chest ; for,' says he, ' the bailee had as little power over them as to any benefit he might have from them, and as great a power to defend them in one case as in the other.'¹

" The very learned judge was dissatisfied, we see, with Sir Edward Coke's reason, that when jewels were locked up in a chest the bailee was not, in fact, trusted with them."²

" Now there was a diversity of opinion on this very point among the greatest lawyers of Rome, for ' it was a question whether, if a box sealed up had been deposited, the box only should be demanded in an action, or the clothes which it contained should be also specified.' And Trebatius insists ' that the box only, not the particular contents, must be sued for, unless the things were previously shewn, and then deposited.' But Labeo asserts ' that he who deposits the box deposits also the contents of it, and ought therefore to demand the clothes themselves.' What then if the depositary *was ignorant of the contents* ? It seems to make no great difference. ' And I am of opinion,' says Ulpian, ' that although the box were sealed up, yet an action may be brought for what it contained.'³

" This relates chiefly to the form of the libel ; but surely cases may be put in which the difference may be very material as to the *defence*. Diamonds, gold, and precious trinkets, ought, from their *nature*, to be kept with peculiar care under lock and key ; it would therefore be *gross* negligence in a depositary to leave such a deposit in an open antechamber, and *ordinary* neglect at least to let them remain on his table, where they might possibly tempt his servants. But no one can proportion his care without knowing the nature of the things. Perhaps, therefore, it would be no more than *slight* neglect to leave out a drawer, a box, or a casket, which was neither known, or could justly be suspected to contain diamonds. * * * * *

" Chief Justice Thorpe is of opinion ' that a general bailee *to keep* is not responsible *if the goods* be stolen, without his *gross* neglect.'⁴ And it appears, indeed, from Fitzherbert, that the party was driven to this issue whether the goods were taken away by robbers."

Thus far Sir William Jones, although the remainder of the argument on this question is well worth the trouble of reference.

The Mosaic law acquitted the defendant in case of theft, if he could swear before the judge that he had not put his hand to his neighbour's goods.⁵

If there be no questions asked as to the contents, there is ground to believe the bailee is liable, for it was his duty to ask, and if he neglected to do so, to use the same care as if the box

¹ Lord Raymond, 914.

² 4 Rep. 84.

³ P. 16, 3, 1, § 41.

⁴ 29 Ap. 28 Bro. Abr. tit. Bailment,

1. 7.

⁵ Ex. xxii. 7, 8.

contained goods of *the greatest value*, for he would be responsible in case of loss for *culpa lata*; but if he asked, and was told an untruth, for the value only as represented,¹ which might vary in degree according to such representation, for it might be that he would have refused to accept the deposit if it were of great value, and accept it if of slight value. And this very fact of inquiry would make him responsible, for if he had not intended to apply care equal to the value, why should he ask?

Thus the case resolves itself into an implied special acceptance in all cases; consequently, in all cases, the bailee is responsible for the value of the contents.

§ 1568.

The actions arising out of deposits are the *actio depositi directa* against the depositary or his heirs, by the deponent or his heirs, and involves the delivery of the *rei in specie cum omni causâ*, with all profits and damage arising from *dolo* or *culpa lata*. The *exceptio compensationis* is not available; but the deposit being looked upon as sacred, must be returned, and an action then brought for the debt. Neither can *exceptio doli mali* be pleaded.² Neither can he claim a real right upon the deposit, but must deliver up the deposit, and vindicate it afterwards.³ Neither can the depositary exercise the right of retention till a debt be paid him. This rule is, however, relaxed when it is proved that the depositary has suffered damage on account of the deposit, or incurred such expenses as ground an *actio depositi contraria*, which lies in the above two instances when the depositary has not exercised his right of retention.

Actions arising out of the depositum.

§ 1569.

Sequestre, says Paulus, *est depositum quod a pluribus, in solidum certâ conditione custodiendum reddendumque traditur*.⁴ A *sequestre*, then, is the *depositum* of a thing in controversy between two or more parties in the hands of a third person, upon condition that he shall keep it safe during the continuance of the suit, and at the end thereof deliver it to him who gains the cause; then it is introduced to avoid a multiplicity of actions.⁵

Sequestre is a bailment in avoidance of a multiplicity of suits.

The *sequestre* may be either *voluntarium*⁶ where the sequestrators are named by mutual agreement of the parties, or *necessarium* where directed by the magistrate, who may enforce it to prevent dilapidation or destruction of the object in issue, or to secure its being carried off,⁷ and resembles an attachment in certain

Is voluntary or necessary.

To prevent dilapidation.

¹ P. 50, 17, 23; Doctor & stud. dial. 2, ch. 38; P. 16, 3, 1, § 35.

² C. 4, 34, post 11; C. 4, 31, 14.

³ P. 16, 3, 13; C. 4, 34, 11; Boehmer, de act. sect. 2, c. 8, § 29; Leyser, spec. 153, med. 2.

⁴ P. 16, 3, 6; P. 50, 16, 110.

⁵ P. 16, 3, 24.

⁶ P. 16, 3, 17.

⁷ P. 49, 1, 21.

To compel obedience to process.

local courts in England, or indeed for contumacy in not appearing on citation: this latter is similar to the practice of distreining in England to compel appearance, *distringas ad respondendum ad testificandum*, and the like.

Applicable to the person by the Canon law.

The Canon law makes it applicable to the person, where there is controversy whether he or she be or be not married to the plaintiff; and this is still done, lest the defendant should marry another in the mean time.¹

§ 1570.

Voluntary sequester differs from a deposit in the consent. Necessary sequester against consent.

A voluntary sequester differs, therefore, from a deposit, in that it is done by consent of two litigant parties to abide an event; but where there is no suit, and such sequester be made by consent, Ulpian² terms it a *quasi sequestre*. In the case of a necessary sequester, that it is done against such consent; but for the most part, if security or caution³ be given, the judge ought to relax such sequester and restore it to its first state: this in England is called replevin, the defendant being allowed to replevy or take back his goods, on giving sufficient security for the result of the action.

Requisites of a necessary sequester.

The previous requisites of a necessary sequestration are—citation, proof of the debt or right, proof of danger of losing such right if sequestration be not granted, a summary inquiry into the cause, oath of calumny, &c.; nor ought a judge too readily to grant it, being in the nature of an execution, which cannot be granted before a judgment.⁴

Duties of the sequesterator.

The office of the sequesterator is, therefore, to preserve the things during the suit, selling such as would perish by keeping; and to give an account⁵ of the sequestration at the termination of the suit; and, if the party cannot otherwise subsist, to allow him alimony thereout, and funds to carry on the suit, if the thing sequestered will bear it.

§ 1571.

Actio sequestraria, directa, and contraria.

When the suit is terminated, and the sequesterator have not delivered to the successful party the thing sequestered, this latter can bring his *actionem sequestrariam directam* for the thing itself and its profits; the *actio sequestraria contraria*, on the other hand, is brought by the sequesterator against the successful party for expenses on, or damage caused by, the thing in question. But if he had the administration as well as the possession, he has also an *actio locati* for remuneration.

The *actio sequestraria* can be brought either against or by the successful party, although he be not the party who delivered the goods to the sequesterator; for instance, A has a suit about a

¹ C. 14, x. de spon. et mart.

² P. 19, 5, 18.

³ P. 2, 8, 7, § 2.

⁴ C. 7, 53, 1.

⁵ P. 16, 3, 6.

garden with B, which he sequesters to C, but loses the suit. B can bring an action against C, or *vice versâ*; for B is supposed to have concurred in the delivery to C, and to have contracted with him, and to have an interest.

§ 1572.

It has been already premised¹ that the word *pignus* has a triple meaning,—that of a right, a thing, and a contract; in its last signification it is a real contract, inasmuch as the debtor delivers the thing, upon which a real right attaches, to his creditor as a security for a claim, coupled with the condition of restoration, on payment of the debt. It would appear that the Romans, in more ancient times, used a solemn contract of pledge, termed *nexus*, and effected *per æs et libram*;² and, inasmuch as this is an accessory contract, it presupposes a debt. It has, moreover, been seen that all things can be the object of this contract which afford the creditor a security; that the creditor cannot use the pawn, but must possess and take care of it—hence that the object must be delivered to the creditor; and lastly, that this is a contract of mutual advantage, for the debtor's profit consists in the fact of his obtaining a credit which he could not obtain without the pledge; and the creditor, in the security, for what is due to him.

Contractus pignoratitius.

§ 1573.

From the first position it results that the contract is void where no debt exists, or where such debt has been cancelled: thus, that if one make on another a claim supposed by the debtor to be well founded, but which turns out not to have been so; that either the obligation had never accrued or had been satisfied; that in such case the contract of pledge is void, but that it is not necessary the debt should be confirmed by the civil law; for a contract and pledge will be good if given for a natural obligation, if not utterly cancelled; then the contract will be valid to cover an obligation originating in a *nudum pactum*, such obligation being simply natural, but, nevertheless, not wholly cancelled. But that the contract will be invalid if, for instance, an obligation arising out of a suretyship transaction attach upon a woman, inasmuch as all debts attaching upon women from such transactions are natural and wholly avoided by the civil law.

Deduction from the first position that a debt is presupposed.

That so soon as the debt is obliterated, the pawn may be demanded back. The Emperor Gordian passed a curious enactment in this respect,³ to the effect that, if a man be indebted on various accounts, having given a pawn as a security for one of them only, such pawn is not redemandable till all be discharged;

¹ § 1462, h. op.

² Canegeter ad Ulp. fr. tit. 9, § 77, pecuniam pignus teneri posse.

³ C. 8, 27, etiam ob chirographarium

seq.

for that although the pawn applies only to the particular debt for which it was given, yet that the pawnee may exercise the right of lien or retention till fully satisfied,¹ including interest and legal expenses, or a pœnal sum; nay, a man can even pawn his right of pawn.

§ 1574.

Deduction from a second position, that all things can be the subject of pawn.

From this and the last axiom, it follows that both incorporeal as well as corporeal things can be pawned. An usufruct² or a right of tithe might be pawned, although a real servitude cannot be so, without the realty³ and a claim in debt,⁴ by the prætorian equity. Occasionally, however, with respect to immoveables, a right of pawn accrued without possession, *pignus in specie iri dictum*; for Ulpian says,—*Proprie pignus dicimus, quod ad creditorem transit; hypothecam cum non transit, nec possessio ad creditorem*.⁵

The thing belonging to another, as well as that belonging to oneself, can be the subject of a pawn with consent of the owner;⁶ naturally, things not in commerce cannot be pawned, as free persons, one's children, and the like, nor things as to the title to which a suit is pending; for so long as this is the case, they must remain *in statu quo*.

Deduction from the third position, that the creditor cannot use, but must possess and keep the pawn.

From the third axiom is deduced that the pawnee cannot legally use the pawn, although this may be *tacitly* permitted, as would be the case of the product of a garden or field pawned⁷ by way of interest; but if this be specially agreed, it is termed a *pactum antichreticum*;⁸ and this antichretic contract is often clothed in the form of a re-sale, and is termed *tacit*, when the creditor may withhold as much of the produce as is equal to the interest of the sum lent.⁹

Deduction from the last position, that it is a contract of mutual advantage.

From¹⁰ this last axiom it follows that a *culpa levis* attaches on either side; it is true that we find *venit in hâc actione (pignoratitiâ directâ)*, et dolus, et culpa ut in *commodato*, which renders the bailee responsible for the slightest possible neglect; hence Wieling supposes *hâc actione* to apply to some other law cited in the *proœmium*, though others dispute this position.¹¹

§ 1575.

Actions on the contractus pignoratitius as such.

As in the former cases, two actions, one direct and the other contrary, arise out of this contract.

¹ P. 13, 7, 8, § 5; C. 4, 32, 4; C. 8, 14, 6.

² P. 20, 1, 11, § 2; P. 20, 1, 15, pr.; P. 20, 6, 8, pr.

³ P. 20, 1, 11, § 3; Schulting. thes. contr. dec. 78, th. 8.

⁴ P. 13, 7, 18, pr.

⁵ P. 13, 7, 9, § 2.

⁶ Ch. Gottl. Gmelin, commentatio de

jur. pig. vel hyp. quod cred. deb. in re sibi non prop. constituit, Ulm. 1768, 8.

⁷ P. 20, 2, 8.

⁸ C. 4, 32, 14, & 17.

⁹ P. 20, 2, 8; Noodt. de fœn. et usur. 1, 2, c. 9.

¹⁰ Lect. jur. civ. 1, 7.

¹¹ Marckart, prob. recept. lect. part 1, p. 101; Lamprecht, diss. cit. 10 & 19.

The pawnor has the *actio pignoratitia directa* against the pawnee for non-delivery of the pawn and all that appertaineth thereunto on payment of the debt, together with indemnity for damage arising from *culpa lata*, or *levis*.

The *actio pignoratitia contraria* lies for such expenses as were necessarily incurred in the keeping of the pawn; but expenses of improvement are only demandable when such have been made by consent of the pawnor, or are not inconvenient to him to repay; or when the pawnee has suffered by the *culpa levis* of the pawnor, or wishes the thing of a third party pawned to be replaced by some other object; or when the thing which should have been delivered has not been so;¹ lastly, when the pawnee has allowed the pawnor a temporary use of the pawn which he refuses then to return.

Although, then, strictly speaking, a *contractus pignoratitius* is supposed on account of the personal nature of the liabilities involved in other liens, yet the law has permitted an *actio pignoratitia utilis* and *in factum* to lie² as a personal action; the *directa*, of course, can naturally not be instituted against a third party after termination of the lien, such must be reached by a possessory action. It is equally clear that the *pignoratitia directa* lies against a third party to whom the creditor has pledged the thing in question by authorization of the debtor, or in the case where he may have ceded his right of action to the latter; legally, however, this is as little an exception to that principle as the admission of an *actio in factum*, where the third party has made himself, as representative of the pawnor, in some degree personally responsible for the return of the thing to the latter.³

In the Institutes no particular title is dedicated to innominate contracts, which have already been generally alluded to, and found to be in their genus duplex, in their species quadruplex. In the first two, *do ut des* and *do ut facias*, the giving is the condition precedent, the consideration for which is an act to be thereafter performed; but in the case of the second species, *facio ut facias* and *facio ut des*, the fact precedes, whether that fact is to be compensated by another act, or by a gift.⁴

Innominate contracts.

The peculiar feature in innominate contracts is, that they allow a *locus pœnitentia*,—that is to say, the party thereto of the first

Their peculiarities.

¹ The *actio hypothecaria* must not be confounded with the *pignoratitia directa* or *contraria*, being a real action against every possessor for delivery on payment of the debt; while the *act. pig. directa* lies only by the pawnor to recover a pawn, and the *contraria* against the pawnor for damages and indemnity.

² P. 13, 7, 11, § 5; P. 39, 2, 34; P. 42, 5, 9.

³ P. 13, 7, 13, pr. & 27; C. 8, 24, 2; C. 8, 30, 2-3-4; x. de pig. (3, 21).

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⁴ Höpfner very properly rejects the distinction between regular and irregular contracts: the first being such as have no particular designation such as the others have, and observes that a paradox is involved in giving a nameless contract a name, § 800 & § 802. The distinction is unknown to the Roman law, vide Floercke de contractu æstimatorio, tanquam contractu nominato, Hal. 1756.

Right of withdrawal.

part, so long as the party thereto of the second part has not fulfilled his engagement to withdraw from the bargain, and recover by the action termed *condictio causa data, causa non secuta*, whatsoever he may have given in that behalf, because the obligatory force of a real contract consists in its fulfilment; whoso, then, undertakes the fulfilment is bound. Thus, if A have fulfilled his part, B is bound, and A ceases to be bound any longer, and can retire; not so B. A can bring his action, *condictio causa data, causa non secuta*, for recovery of whatever has been given; but if, on the contrary, A will hold B to his bargain, he must sue on the obligation, by the *actio de præscriptis verbis*, for specific fulfilment or commensurate damages: such action is also termed *actio in factum, in factum civilis, incerti, incerti civilis, præscriptis verbis incerti*, or *quia misso nomine actionis certaque formula rei gestæ seriem exponit et præscribit*.

There are three of these contracts which deserve particular mention.

§ 1576.

Contractus æstimatorius.

The *contractus æstimatorius*¹ is a contract for sale on commission; the object is delivered to another conditionally for a certain price, for the purpose of resale, or to be returned at option. In such contracts, the chief question that arises is, in whom the legal ownership vests. Until the price is paid, the ownership is clearly not transferred, but the conditional purchaser holds as the owner's agent until the transaction shall have become finally complete. When the object has been obtained in a petitory way, it is clear that the possessor is responsible to the owner for accident, but otherwise for ordinary negligence, being bound to *diligentia q. i. s.*²

§ 1577.

Permutatio.

The next innominate contract which possesses some peculiarities is the *permutatio*, or exchange, where one object is bartered for another. *Permutatio* may be considered in a triplex point of view:—

Firstly, The *pactum de permutando* as a *nudum pactum*,—as an innominate contract,—and as a contract fulfilled.

Firstly, A *nudum pactum*, for it consists of reciprocal promises, and not on a nameless contract.

Secondly, Where the one party has performed his part, but not so the other, it is a simple nameless contract of *do ut des*.

Thirdly, Where the exchange has *de facto* taken place, a real *permutatio* arises.

The second is the *permutatio*, which belongs to this place; for

¹ The *contractus æstimatorius* is unknown to the civil law by that name, but it is to be met with in certain expressions, *ex gr.*

si rem æstimatam tibi dederò, etc.—P. 19, 3, 1, pr.

² *Quam in suis* thus shortly quoted by civilians.

the first is no more than a naked agreement for an exchange, which is a mere inchoate idea of the *permutatio*. The latter is as much on the other side, for it is a contract fulfilled already by *both* parties: and although it is not clear in what precise sense the classical jurists used this word, yet it is sufficiently certain that it could have been, in a legal sense, no other than this second signification.

Not only a thing itself, but likewise the use of a thing, was exposed to this contract. Thus, a thing can be loaned, on condition of another thing being lent in exchange, or of a loan being made to a third party, which is another phase of the *do ut des*; but still it is a permutation of use.

§ 1578.

Another species of nameless contract is that termed the *contractus suffragii*, which is also a contract *do ut facias*, and consists in a remuneration being given to an *aulicus*, or person attached to the court, in order to secure his interest *si qui desideria sua explicare cupientes ferri sibi a quoquam suffragium postulaverint*,¹ in a matter which he was not obliged to support *virtute officii*; for if he be under such obligation officially, than the acceptance of any equivalent for his service becomes an illegal act.

Contractus
suffragii.

¹ C. 4, 3, 1. The short title *contractus suffragii* does not appear in the body of the Roman law.

TITLE XX.

Verborum Obligationes—Stipulationes—Actio ex Stipulatu—Duo rei sive Correi Stipulandi et Promittendi, or Co-stipulators—Correi Debendi et Credendi, or Co-debtors and Creditors—Stipulationes Servorum—Divisio Stipulationum—Inutiles Stipulationes, or Void Stipulations—Fideijussio, or Suretyship—Beneficium Ordinis—Excussio et Cedendarum Actionum, or Interpleaders and Cession of Actions—Constitutum.

§ 1579.

Verbal contracts.

Real contracts derive their obligatory power from performance on the part of one of the contracting parties ; but the contracts of subject matter of the present title are rendered binding by a solemn form of words ; such form, having been drawn up by some man learned in the law, became obligatory on recitation by the parties thereto.

§ 1580.

The three original kinds of verbal contracts.

In ancient times there were three sorts of verbal contracts :—The *solemnis dotis dictio*, or promise by the father to the son-in-law ; the *promissio operarum à liberto facta*, or the promise of *opera officiales* to a patron ; *fabriles* not being his bounden duty to promise, although this was also done occasionally and confirmed by an oath, which, in this particular case only, was foundation for an action,¹—for an oath usually did not render the contract more stringent ; and *stipulatio*, which alone was allowed to remain when the others were abolished.

§ 1581.

Mode of stipulating and origin of the term.

Stipulation is performed by way of question and answer—hence its general applicability. *Verborum obligatio seu stipulatio est contractus juris civilis, qui præcedente interrogatione et subsequente statim responsione congrua perficitur.*²

Stipulum has the same signification as *firmum* ;³ and various derivations are supposed as from *stipes*,—that is, *res pecuniaria*, because this was the usual object of the contract ; *stipes*, the stamp on coin ;⁴ or from *stipare*, to stow or press ;⁵ or from a

¹ Cuij, Inst. 2, 9, § 4 ; Donell, in com. jur. civ. lib. 2, c. 16.

² I. 3, 16, pr.

³ Paul. R. S. 5, 7, 1, pr.

⁴ Festus, *stipes*, 139.

⁵ Varro, de L. L. 4, 16, 30.

supposed practice of the ancients of breaking a *stipula*, or straw, and rejoining the same, and acknowledging their promises.¹ As, however, Justinian has preferred the first, that is possibly the true one.

The one party puts an *interrogatio* as to whether the party will sell, to which he makes a fitting reply, that he will; whereupon the party thereto of the first part asks if he will pay the price, and upon an affirmative answer being returned, the bargain is concluded; its most common application is to confer on *pacta nuda* the right of action for breach by such confirmation.

Form of stipulation by question and answer.

Many of these formulæ are found by classical authors:—

——— Ps. *Roga me viginti minas,
Ut ne effecturum tibi, quod promisi, scias,
Roga obsecro, hercle; gestio promittere.*²
Cal. *Dabisne argenti mihi hodie viginti minas?*
Ps. *Dabo.*
Tim. *Nullum periculum est, quod sciam stipularier,
Ut concepisti verba viginti minas,
Daben'?* BA *dabuntur.*³
Ly. *Sponden' ergo tuam gnatam uxorem mihi.*
Ch. *Spondeo, et mille auri Phillipum dotis.*⁴
Ly. *Istac lege filiam tuam sponden' mi uxorem dari?*
Ch. *Spondeo.*

§ 1582.

Both parties thereto are termed *rei*,—the first, *reus stipulandi*; the other, *reus promittendi*, who used the words *spondeo promittis? promitto dabis? dabo facies? faciam*. But the Leonine constitution⁵ abolished the particular form of words, rendering sufficient intendment binding, yet it is difficult to suppose any form of words at once more explicit and more terse, from one party being designated as *stipulator*, and the other *promissor*,—the former word is often used for to promise;⁶ now it is a double reciprocal unilateral contract, for each promises the other, consequently it comprises two contracts.

§ 1583.

A stipulation requires of the parties a *fitting* answer? thus forthwith given, in the *presence* of one another, in *intelligible* language

Requirements of a valid stipulation.

¹ Isodorus, orig. 4, 24, 930.
² Plaut. Pseudol. 1, 1, 112.
³ Pl. l. c. 4, 6, 14.
⁴ Pl. Trinum, 5, 2, 34, & 39.
⁵ C. 8, 38, 10, omnes stipulationes, etiam si non *sollennibus* vel *directis* sed quibuscunque verbis consensu contrahentium composita sunt vel legibus agnitæ suam habeant firmitatem. l. 3, 15, § 1, sed

hæc sollennia verba olim quidem in usu fuerunt, postea autem Leoniana constitutio lata est, quæ verborum sollennitate sublata, sensum et consonantem intellectum ab utraque parte solum desiderat, quibuscunque tamen verbis expressum est.

⁶ Brissonius de verb. signif. voc. stipulari; 1 l'et. 3, 21.

⁷ P. 45, 1, 35, § 2.

respecting a *legal* matter. Thus, as to the first, if the one party say *dabisne equum*, and the other answer *dabo bovem*, such is evidently a bull, and no fitting answer. Moreover, the answer must be ready, first, because both must be actuated by the like *animus*¹ and agreed; both question and answer must be verbal in the presence of one another, consequently deaf and dumb persons were incapable; the parties were not bound to the solemn words, so that those used were clear, positive, and intelligible. Lastly, the cause of the stipulation must be a just condition precedent.²

Notwithstanding that it is immaterial whether the stipulation be made in Greek or in Latin,³ and that it suffices that the parties understand each other by interpreter or otherwise;⁴ it is, nevertheless, indispensable that the stipulation be made *ore tenus*; nor will it avail that the one interrogate and that the other nod assent;⁵ nor that it be performed by letter, where the parties are absent.⁶

§ 1584.

All who can contract can stipulate.

Those who can contract, can also validly stipulate; hence lunatics and persons under mental disabilities are prohibited; and a slave stipulating acquires not for himself, but on behalf of his master, except an act be stipulated for.⁷ A *servus hæreditarius* in so far formed an exception as to be enabled to stipulate validly, before he had actually administered to the estate; this was necessary to support the fiction *hæreditas jacens personæ defunctæ vicem sustinens*.

Pupilli, whether infants or *pubertati propiores*, can neither promise nor stipulate, this power vesting in their tutors; but an infant can acquire by his slave, consequently the slave's stipulation resulted to the infant. But it would seem that the *pubertati proximi*⁸ have in so far an advantage as to obligate others, but to be incapable of binding themselves without the authority of their tutors.⁹

Stipulations of children under power.

Children under power can stipulate validly, and accept promises from others in like manner, except in cases of loan, in which they are restrained by the *Senatus Consultum Macedonianum*.¹⁰ The *unitas personæ* allowed no stipulation to be binding between the father and son under power.

A stipulation cannot be made for another.

Stipulations for another person are invalid,¹¹ it being a maxim of Roman lawyers that an obligation arising *ex contractu* only binds the contracting parties,¹² except such third party be interested;¹³ hence a tutor can stipulate for his co-tutor.¹⁴ To evade this, it

¹ Goddæus, contr. stip. p. 266, seq.

² P. 44, 4, 2, § 3; P. 46, 1, 15, pr.

³ I. 315, § 1.

⁴ P. 45, 1, 1, § 2.

⁵ Ibid.

⁶ I. 3, 15, § 11.

⁷ I. 3, 17, pr. § 1 & 2.

⁸ § 1511, h. op.

⁹ I. 3, 19, § 9.

¹⁰ § 311, § 1538, h. op.

¹¹ I. 3, 19, § 4.

¹² C. 8, 38, 3.

¹³ I. 3, 19.

¹⁴ I. 3, 19, § 19.

was usual to stipulate for a penalty to be paid if a certain other be not satisfied.¹

§ 1585.

The *stipulatio* is said to be *incerta*² when one of a genus is promised, but *certa* when a *species* is the object of the contract, *jura* without any condition, or *conditionata* with a condition attached *in diem* for a certain period ; but whoso promised for such certain period was held to have promised for ever, of which the unsatisfactory explanation is given, *tempus non est modus tollendi obligationes*. But why ? Again, *ad tempus non potest deberi* ?³ But the prætor, doubtful of the justice of this rule, granted relief, by allowing the plea of *exceptio doli mali*, or *pacti conventi*.

A stipulation may be *certa* or *incerta*, *jura*, *conditionata*, *in diem*.

A stipulation may be for a certain sum, from a certain period, or at a certain day, and the whole must be paid before performance is due,⁴ though strictly due at the time of the contract ; but if an impossible day be added, such condition is disregarded, and the debt is due forthwith, as the day after the day of judgment. It may be due at a certain place, and then time is to be allowed for the journey. Lastly, it may lie in gift or in feasance—that is, consist in giving or doing, but nonfeasance, not doing must also be understood.

The distinction of *vera* and *ficta*, an action *ex stipulatu* by a woman for the recovery of dower, is of modern introduction.

§ 1586.

The *actio ex stipulatu* extends to heirs, and is *actio incerti* with respect to a *genus*, and *actio certi* when an *individuum* is in question.

The *stipulans*, or he to whom the promise is given or his heirs, has his action against the promisor, or his heirs, for the *res* or *factum* promised.

§ 1587.

Two rules applied to obligations on stipulations *in solidum* ; these, however, are not without exceptions. The first rule is, that parties are answerable *pro ratâ* ; thus, if a person die, leaving three heirs, each is responsible for one-third of the integral debt. The exceptions are when there are many contracting parties, each of whom are subject for the whole on the contract. Payment by one will release the rest. In this case such co-obligatees are termed *rei* or *correi debendi*, and the co-obligors *correi credendi* : such obligation is termed *obligatio correalis activa*, if creditors,—or *obligatio correalis passiva*, if debtors. And here it may be remarked that it is not incorrect to call a debtor as well as a creditor *reus*, for the word in its primary meaning imports him who has an interest either way in the subject matter quasi *a re*.

Rules applicable to stipulations in *solidum*. Each is answerable for the whole demand.

Correi debendi et credendi.

¹ I. 3, 19, § 18.

² I. 3, 16, pr. et seq.

³ I. 3, 16, § 3.

⁴ P. 50, 17, 186.

Object of the correal obligation.

The correal obligation may result not only from contracts or testamentary dispositions, but from positive legal enactments. This obligation is for the protection of a creditor, that he may, of many debtors bound *in solidum*, sue him whom he may be able to find, or him who may be solvent: thus, a testator may bind his heirs *in solidum* for the payment of legacies.¹ The following points have been also established by law:—

The correal obligations—1. Bind many who have caused damage by illegal acts, or for private penalties. 2. Bind many tutors or curators to their pupill *in solidum*. 3. Make mercantile partnerships answerable for the acts of their agents. 4. Bind co-depositaries.² 5. Bind many sureties jointly as well as severally. Thus the Romans term the co-debtors on such stipulation, *in solidum correi promittendi*, and the co-creditors, *in solidum correi stipulandi*.

§ 1588.

Form of correal stipulation.

As to the form in the case of *correi promittendi*, each promised for the whole sum severally, the promittee saying, *dabisne mihi millo?* And the promittors severally answering *dabo*, the other *et ego dabo*. And in that of *correi stipulandi*, the promisee asked, *spondesne mihi millo?* And the promisor answered, *utrique vestrum dare spondeo*.

§ 1589.

Beneficium divisionis.

Such is then the nature of the correal obligation; but Justinian added the *beneficium divisionis*, which consists in a tender of the share of him applied to, and a promise to pay the remainder if the creditor cannot obtain it from his co-obligees; it has been doubted if this extended to a lease, but it would seem it does.³ Under certain conditions, which are—1. That the other co-obligees be present. 2. That they be solvent. 3. That the obligation do not arise out of an illegal act. 4. That the advantage have not been renounced expressly. The payment by one, it has been observed, releases the rest.

§ 1590.

Operation of the correal obligation on the creditor.

Now the creditor *correus credendi* can demand the whole debt or thing from one of those bound *in solidum*; nor can the latter reply that he will pay the proportion due to that particular creditor, but having paid him, the right of the creditor is extinguished. The *correus stipulandi* can release his debtor not only by his receipt, but by *acceptilatio*, *novatio*, or *juramentum delatum*; neither can a creditor refuse to accept without good ground.

¹ P. 30, 1, 8, § 1.

² P. 16, 3, 1, § 43; P. 13, 6, 5, § 15.

³ Pro Puf. t. 2, obs. 77; contra Nov.

99; Heinec. Pand. p. 7, § 22.

⁴ Vinn. ad I. 3, 17, 1, n. 2.

The *correus debendi*, or debtor *in solidum*, who has paid, releases himself and his co-debtors, whom he cannot, however, sue for contribution, for he has taken the whole debt on himself; but if he be in partnership, he can bring the sum paid into the partnership account, and so recover by contribution, or by obtaining a cession or assignment of the creditor's right. But even without this, he has an *actionem negotiorum gestorum utilem* against his co-debtors; for had he not paid, they must have done so.¹ Of course the debt must not arise out of a *delictum*.²

A *correus credendi* who has obtained a greater share than that to which he was justly entitled, is not obliged to share it, except in cases of partnership, where he must carry the sum to account, or where it has been agreed among the *correi* that whoever might obtain payment, should refund to each his due proportion.

§ 1591.

No man could stipulate on the part of another, except he were a *filius familias*, or a slave :³ the first being, by the Roman fiction, the same person as the father acquired for him; and whatever the slave obtained was looked upon as an *accessorium*.

Acquisition by stipulation through other parties.

The slave in many cases derived the right of stipulation from his master.⁴ The heritage so far represents the defunct, that whatever the *servus hæreditarius* stipulates for accrues to the inheritance; hence it also accrues to him who ultimately becomes heir. Nevertheless an usufruct cannot be acquired in this way;⁵ nor an heritage for which act the *jussus* of the master during his lifetime is necessary.⁶

In the case of a *servus communis* or the slave of many masters, whatever he may stipulate for becomes the joint property of all, in the absence of any stipulation on his part in favor, or by order, of any of his masters in particular.⁷

By a *servus communis*.

Ulpianus ad Sabinum⁸ holds that the slave of a *universitas*, such as a *reipublicæ municipii*, or *coloniæ*, may acquire for those bodies by stipulation.

§ 1592.

Stipulations are for the most part voluntary. The constituted authorities, however, sometimes called upon a party to give security by stipulation; hence the distinction between *voluntariæ*, or *conventionales*, and *necessariæ*.

Stipulations are voluntary, conventional, or necessary.

Necessariæ are of three descriptions,—*prætoriæ*, *judiciales*, and *communes*. The first are directed by the *prætor*, the second by the *judex pedaneus*, and the latter indifferently by either. The præ-

Necessariæ are prætorian, judicial, or common.

¹ P. 27, 3, 1, § 13.

² P. 27, 3, 1, § 13 & 14; P. 18, 1, 35, § 2; P. 46, 1, 70, § 5.

³ I. 3, 18, § 1.

⁴ I. 3, 18, pr.

⁵ P. 45, 3, 26.

⁶ P. 29, 2, 25, § 4, et seq.

⁷ I. 3, 18, § 3.

⁸ P. 45, 3, 3.

torian are usually effected by bondsmen and pawn, but those under the jurisdiction of the ædile are likewise prætorian; and although they may be perpetual—that is, for thirty years—yet they are more usually *annales*, as where a penalty is appended; but the *judiciales* are effected by a bare promise only, and are always perpetual.

§ 1593.

Prætorian.

The prætorian includes ædilian, or matters of police; thus, the seller of a beast must give security *animal esse sanum* (edere) *bibere ut oportet*; or if a slave, that he be not a *fugitivus, erroneus*, &c. But these questions properly appertain to the province of the ædile, in his character of surveyor of the markets.

§ 1594.

The cautio prætorie de damno infecto.

The first prætorian caution is *de damno infecto*, which is applied in cases where a house is in a dangerous state, in order to force the owner thereof to give security for the amount of damage that the falling of his house may cause to his neighbour's property. For as he has the choice of repairing the damage, or resigning the materials in indemnification which may have fallen on his neighbour's premises, and as this might be insufficient to cover the damage done, the matter is referred to the prætor, who may order that the owner of the house find security; but if it be neglected, the plaintiff may be put into joint possession of the premises, called *immissio ex primo decreto*, which, if the defendant remained obstinate, is followed by *immissio ex secundo decreto*, which involved full possession.

Immissio ex primo and ex secundo decreto.

If the tenant be not proprietor, he must give security by bondsmen; but if he be the real owner, by simple promise.¹ This caution lasted only a year, at the expiry of which time, if the danger continued, the *immissio* must be prayed anew.²

§ 1595.

Cautio legatorum servandorum nomine.

Cautio legatorum nomine, or *cautio legatorum servandorum causâ*, is prayed for caution on the part of the heir, that he squander not a legacy left *ex die*. The same is applicable to a legatee who may have to pay over a legacy.

§ 1596.

Cautio de dolo.

The *cautio de dolo* is judicial, and nothing more than an injunction to stay waste until such time as the suit pending with respect to any object shall have been terminated.³ The same end may be attained by sequestration.⁴

¹ P. 39, 2; 17, pr.; 13, pr. § 1; 15, § 2; 30, § 1.

² P. 39, 2, 15.

³ Goddæus, com. de con. et com. stip. cap. 5, n. 202; P. 6, 1, 20, & 45; P. 4, 2, 7, & 9, § 5.

⁴ Vid. § 1569.

§ 1597.

Cautio de persequendo servo consists in a security being given by the possessor for searching for a slave who has run away, after sentence pronounced that he is the property of another. Cautio de persequendo servo.

§ 1598.

Cautio de pretio restituendo is prayed when a service is promised. Each co-heir is responsible for the entire service, consequently each co-heir can, on the division of the inheritance, demand caution from the other co-heirs that they will hold him harmless if he be condemned to the entire service. Cautio de pretio restituendo.

§ 1599.

The *cautio rem pupilli salvam fore* belongs to the category of common stipulations, and is the security demanded from a guardian that he will duly and truly administer. Cautio rem pupilli salvam fore.

The *cautio de rato* is given by an agent or attorney who appears for another without a formal power of attorney, to the end that the principal will ratify what has been done in his name. Cautio de rato.

§ 1600.

Stipulationes conventionales are manifold, and applicable to all contracts, and so called from their being based on the mutual consent of contracting parties. Stipulationes conventionales.

§ 1601.

A *stipulatio*, to be binding, should possess generally all the attributes of a valid contract; consequently, one that has not these is ineffectual in law,—that is, no action arises out of it, and it is hence called a *stipulatio inutilis*. A verbal contract is *inutilis* if the answer be unfitting,¹ as when to the question *dabisne mille? dabo centum* be returned; for it is clear the contracting parties have definitively settled nothing. Or if the parties be absent, for then no words can pass.² Or if it contain something contrary to established principle. The case of a stipulation to take its effect on the death of the party³ is obnoxious to the principle *obligationes et actiones, quæ non cæperunt à defuncto vel contra defunctum, a personâ hæredis vel contra eum incipere non possunt*. Upon this principle, *tibi dabo centum pridie quam moriar*, or *pridie quam morieris*, is bad, for this presupposes the day of the death to be known.⁴ Justinian rendered this stipulation, however, valid,⁵ and ruled that the obligation acquired, retrospectively, force from that moment. An impossible, called *præpostera*, stipu-

A stipulation must possess all the requirements of a valid contract, otherwise it was inutilis, or ineffectual.

¹ I. 3, 20, § 5.² I. 3, 20, § 11.³ I. 3, 20, § 14, & § 15.⁴ I. 3, 20, 12; Cuij. In. 2, 9, 7, & 8.⁵ C. 8, 36, § 11; C. 4, 11, 1.

lation is bad, *Si navis cras ex Asia venerit, hodie dare spondes?* was of this description. Justinian ruled that such should be considered as conditional stipulations.¹ It is equally absurd to promise what does not exist in nature,² or what cannot be bought or sold, technically *non est in commercio*, as a *res sacra religiosa, publica*, or a free man, because over him we have no control, and the thing stipulated for must be *in dominio nostro*.³ Likewise a stipulation dependent on another's will, that he give or do something, is bad.⁴ Even so a stipulation made in favor of one under whose control the stipulator is not, unless indeed he stipulate for half for himself and half for such person; in such case the stipulation as to the first half is good, but as to the second bad.⁵ Nor can a stipulation take place between the *dominus* and him, *jure suo subjectum*.⁶ Deaf and dumb persons, or *furiosi*, are also disqualified. A *pupillus* cannot stipulate without his tutor's authority; nor an *impubes* under power, even with his father's assent.⁷ Impossible conditions also vitiate the contract, or the stipulating concerning that which may at a future time belong to one.⁸ A stipulation to perform a criminal or illegal act is naturally void.⁹

§ 1602.

Suretyship

Suretyship, termed *fidejussio*, is a form of stipulation, and appears under various phases. Its object is to furnish the lender with a collateral security, in the alternative, that if the principal debtor should be unable to satisfy the obligation, another who had previously agreed in that behalf should step into his place, and be subject to his liabilities.

may form an
ingredient in all
contracts.

Bills of ex-
change.

Suretyship may form an ingredient in all contracts, and it often happens, that the real credit is given rather to the surety than to the principal obligee. In commercial transactions in the present day this is generally the case, and appears in various forms; the most common of which is the case of bills of exchange, in which the responsibility of the drawer is less considered than the credit of the drawee, and of the drawee less than of the indorsors, and of the indorsors less than of the acceptors when the drawee has become such. For the first thing looked to is, whether there be the names of solvent and responsible persons upon the back of the bill, who being presumed to have received value, have made the debt their own. But as soon as the drawee has accepted, he has definitely bound himself to pay.

Guarantees.

Guarantees are another species of suretyship, and their only essential is, that a sufficient cause or consideration should appear on the face of them. In bonds, on the contrary, this is not requisite. The co-securities in a bond being presumed by the

¹ Vinn. ad I. 3, 20, § 13.

² I. 3, 20, § 1.

³ I. 3, 20, pr.

⁴ I. 3, 20, § 3.

⁵ I. 3, 20, § 4.

⁶ I. 3, 20, § 6, 7 & 8.

⁷ I. 3, 20, § 9.

⁸ I. 3, 20, § 21.

⁹ I. 3, 20, § 23.

very nature of the instrument to have received a due consideration for their suretyship.

Statute law and usage concur in England in requiring that most collateral securities should be reduced to writing, to avoid fraud and render the evidence of the fact more certain and clear. Nevertheless the oral promise of one party to pay the debt of another was formerly binding, but it now comes within a provision of general law, which requires that such promise to be effective should be in writing.¹

Verbal contracts are evidently the most ancient of all, because they were usual during a period in which education was in its infancy, and writing rather an accomplishment than a matter of course, as it is in all of the more civilized countries of modern Europe. In the classical times, too, writing was, on account of the materials used, both expensive and troublesome. To complete, however, the evidence of the fact, witnesses took the place of writing; and in order to impress it upon the memory, solemn forms were introduced. So long, then, as the parties lived there was pretty complete evidence of a promise made. Nor is it improbable, that this mode of contract contributed very considerably to the development of the law of prescription, rendered less necessary when a more permanent sort of evidence was introduced.

Verbal contracts
the most an-
cient.

It now remains to see what provisions applied to suretyship under the law of Rome.

§ 1603.

Suretyship is defined to be an obligation by word of mouth, whereby one party pledges his credit for the obligation of another, in such a manner, however, as not to release the principal obligee.

Suretyship binds
the security
without libe-
rating the prin-
cipal obligee.
Definition of
fidejussio.

*Fidejussio est verborum obligatio quâ quis alienam obligationem in fidem suam suscipit ita ut debitor principalis maneat obligatus.*²

Fidejussion, surety, or guardianship, is then performed by a *repromissor*, *adpromissor*, *sponsor*, *præs*, *vades*, or *subvades*, binding himself together with the principal debtor, for the greater security of the creditor. In the first place, he undertakes an obligation not originally his own. In the second, he does it by stipulation, and without novation, so that the principal debtor is not discharged,—for if any one undertake the debt of another without stipulation, *nudis verbis*,³ it is called *constitutum alienum*;⁴ if by commission, a *mandatum*;⁵ or if *ex promissione*, the principal debtor was entirely freed *novando*, a new debt being in fact created.⁶ Hence it follows that *fidejussio* being an accessory contract, the fidejussor being only *in subsidium*, can require that the

Fidejussio an
accessory con-
tract.

¹ 29 Car. 2, 3, § 4, Statute of Frauds.

² I. 3, 21, pr. § 1.

³ I. 4, 6, § 9.

⁴ Vid. § 1617.

⁵ Vid. tit. xxv. post de mandatis.

⁶ P. 12, 4, 4.

principal debtor be first sued to judgment, and that execution be taken against him before he or his heirs¹ can be rendered liable.

§ 1604.

The older Roman law required the principal obligee to be first sued; otherwise about the middle period of Roman history.

Justinian revived the old law.

During the earlier periods of Roman history it appears that a creditor must first sue the principal debtor, which Justinian² informs us was the provision of an ancient law, according to Cujacius³ of the Twelve Tables; but in the middle period it was competent to the creditor to begin by suing either, or even to vary, that is, begin by suing the principal debtor, and then abandon that action, and proceed against the securities. This was certainly the practice in Cicero's⁴ time; but it is not known when it originated. Justinian revived the old law declaring, that if present, the principal debtor should be first sued; or that, if the surety were first proceeded against, he might plead the *exceptionem ordinis et excussionis*.⁵ The surety in this case is proceeded against, *actione ex stipulatu*;⁶ but in any case, he has his regress against the principal debtor, but not before he has paid for him.

§ 1605.

Bail in public judgments.

If the *judicium* or suit be a public one, this security is required from the plaintiff also,⁷ termed *subvades*; and whoso is bound for the *reus* in a public judgment is termed *vas*, but *præs* in civil suits: this distinction fell into disuse in later times; and the term *præs*, or *vades*, came to be used indiscriminately for all bail for appearance. Varro⁸ defines *vas* to be *qui pro altero vadimonium promittit*; but *prædes*⁹ to be such as gave security for tax-gatherers or farmers of the revenue, *publicani*, or those who were surety for the payment of fines to the nation: in short, public accountants.

§ 1606.

Extra-judicial bail.

Those bound extra-judicially, as *sponsores*, *adpromissores*, *fidei promissores*, *fidejussores*, differ chiefly as to the form:¹⁰ thus, if the question be *spondeo*, the answer is *spondeo*, and the answerer hence termed *sponsor*; if *adpromittis*, *fide promittis*, or *fidejubes*, the answer is respectively *adpromitto*, *fidei promitto*, *fidejubeo*; if the promise be made in Greek, *τῇ ἐμῇ πιστεῖ κελένω ἐγὼ, θέλω, βούλομαι, φῆμι* or *λέγω* are held to be terms¹¹ equivalent to the foregoing. In judicial fidejussions there are also certain forms requisite to be observed.

¹ I. 3, 21, § 2.

² Nov. 4.

³ Ad Nov. 4.

⁴ Cic. ep. ad Att. 16, ep. 15.

⁵ Vid. § 1610.

⁶ Puf. tom. 4 obs. 86.

⁷ I. Goth. ad Leg. XII. Tab. 2, p. 191.

⁸ De LL. 5, 7, p. 42.

⁹ Fest. voc. *præs*. p. 375.

¹⁰ Cuj. ad Paul. R. S. 1, 20.

¹¹ I. 3, 21, § 7.

§ 1607.

Such as bound themselves judicially for others, were termed *vindices*, *vades*, *subvades*, *prædes*; the rest bound extra-judicially, *sponsores*, *adpromissores*, *fidei promissores*, *fide jussores*; all which terms, except the last, Trebonian zealously excluded from the Digest.¹

Vindex is he who appears at the instance of a private individual before the court to bind himself; for if any one summon another before the court by the words *ambula in jus*, he must either go or be dragged thither; to save himself from which disgrace, he must give bail. The law of the Twelve Tables provided *si ensiet, qui in jus vocatum vindicit, mittito, assiduo vindex assiduus esto: proletario cuique volet, vindex esto*.² By *assiduus*, is here meant *locuples*, quasi ab *asse dare*; by *proletario*, a poor man: in a word, every one's bail must be adequate to his wealth and position in life; a rich man to give bail for a rich, and any one for a poor man.

Bail in public suits were termed *vindices*, *vades*, *subvades*, *prædes*; in civil suits *sponsores*, *fidei promissores*, or *jussores*. *Vindex*.

§ 1608.

A surety can be bound neither more firmly, *magis efficacius*, nor for a greater sum, *in majus*, than his principal; and thus say the Institutes,³—*fide jussores ita obligari non possunt ut plus debeant, quam debet is, pro quo obligantur*; to which follows the reasoning *nam eorum obligatio accessio est principalis obligationis; nec plus in accessione potest esse quam in principali re*. If the surety bind himself to pay at a place at which it may be more difficult to make such payment, or at a time before the principal debtor can be sued, or in a certain manner differing from the obligation of the principal debtor, or a certain amount more than the principal, all such contracts are absolutely void the entire security, where the fidejussion is made by stipulation; for Ulpian⁴ says expressly,—*qui in duriolem causam accipiuntur omnino non obligantur*. The thing must also be the same: thus, if A have promised to pay 100 aurei, the surety cannot promise a cask of wine on that account; and Javolenus⁵ says on this point,—*si ita fidejussorum accipero, quod ego decem credidi, de ea pecuniâ modios tritici fide tuâ esse jubes, non obligatur fidejussor, quia in aliam rem quam quæ credita eat fidejussor obligari non potest*.

Surety not liable to a greater extent than the principal.

§ 1609.

Since fidejussion is applicable to all obligations as an accessory contract,⁶ and as it cannot be for a greater sum than the principal, so it does not apply to a purely natural obligation if such be destroyed by the civil law; as, for instance, to a gambling debt. It also applies to civil obligations if such be actionable; but if they be not so, the surety may protect himself by the same plea as the

Fidejussio is applicable to all contracts.

¹ Salmas. de mod. usur. 16.

² Gell. noct. Att. 16, 10.

³ I. 3, 21, § 5.

⁴ P. 46, 1, 8, § 7.

⁵ P. 46, 1, 42.

⁶ P. 45, 3, 6, § 1, 35.

principal debtor. In the case of personal pains or penalties (*finēs*) arising *ex delicto*, suretyship is inadmissible, the object being to punish the individual, and warn him to good behaviour in future. But the security given by the husband to his wife on account of the portion she brings is void, not so pledges;¹ but the reason, *ne causa perfidiæ in connubio generetur*, is unsatisfactory,² and the logic that the pledge is in fact a *donatio propter nuptias* as attaching *in re*, subtile.

§ 1610.

Prior liability of the principal.

Justinian, as has been before observed, by his Fourth Novella introduced the *beneficium ordinis*, by which the surety required that the principal debtor be sued in his order; and *excussionis*, *ut excutiatur debitor principalis*, or sued to judgment, and that execution be had: thus it is not unlawful to attack the surety first, nor can the judge, *ex officio*, stay the action, but leaves the defendant to his plea; of which, if he take no advantage, judgment went against him. The creditor can, however, refuse security without a clause, renouncing this privilege, and allowing him to sue either at choice; and such clause was legal. Berlich³ enumerates ninety-four cases in which this *beneficium* did not apply, but which it would be out of place to enumerate here. The general rule is, that in all cases where the creditor would be damaged, or it be useless, that he should sue the principal, the surety cannot claim the *beneficium*.

§ 1611.

Protection of the surety by the *exceptio ordinis*.

The surety can take advantage of another benefit, if he suspect the pecuniary affairs of the principal debtor be getting into a bad state, and that insolvency be likely to follow, viz., by making application, *ex officio*, to a judge to move the creditor to sue the debtor, termed *provocatio ex lege si contendat*;⁴ if, then, he sue the surety, and this latter plead his *exceptio ordinis*, he is relieved by the principal debtor paying; but if the creditor neglect to sue till the debtor become insolvent, the *exceptio ordinis*, having been declared *pro perpetuâ*, can be pleaded in bar at any subsequent period.

§ 1612.

Power of the creditor to select one of many co-obligees.

When there are many co-securities, they are all jointly and severally bound (*in solidum*), whether expressly *conœaliter obligati* jointly and severally or not, and the creditor may select any one and force him to pay the whole sum; such payment by him, however, absolves his co-securities. He has, however, not only the usual recourse against the principal debtor, but also against each of the sureties, so that if one only be solvent, the creditor is secured from loss.

¹ P. 24, 1, 7, § 6.

² C. 5, 20, 2. The husband received the *dos*, which vested in him absolutely; as a set-off, he settled on the wife the *donatio*

propter nuptias, which she on separation retained, if he did not duly return the *dos*.

³ Part 2, Conclus. 24.

⁴ P. 45, 3, 28.

§ 1613.

By the *beneficium divisionis ex epistolâ D. Hadriani*, if all the co-sureties be present and are solvent, he of them who is sued can require that his share, *ratam*, be accepted by the creditor, and that such creditor sue the others for their proportions in like manner; but if he neglect this, and pay the whole, he cannot sue his co-securities for contribution,¹ for he is alone responsible for the whole without reference to them, and this is the logical reason why partners cannot sue each other at common law.

Beneficium divisionis.

§ 1614.

The *beneficium cedendarum actionum* is operative in respect of the principal debtor; and here three cases may be supposed:— That the debtor required the security; in which case an *actio mandati contraria* lies against the debtor if the surety pay the debt for him; nor is it necessary that the creditor cede to the surety his right of action to enable him to sue the principal debtor, although it may be advantageous in cases where such action is preferable to the *actio mandati*. Moreover, supposing the debtor have given an hypothek as extra security, the cession is beneficial, since it enables the surety to commence a real action (*actio hypothecaria*), which is always preferable to a personal one, such as the *actio mandati*. The second case which may be imagined is, that the security has been given without the debtor's knowledge, and that the surety has been called upon to pay for his principal's default; the *actio* in this case is *negotiorum gestorum contraria*, hence no cession is required, for the security is for the debtor's benefit; it may, nevertheless, be advantageous under the same circumstances as above. But if we suppose the security to have been given against the debtor's wish, then the *cessio* is necessary, as there exists no other valid ground of action. Thirdly, the question arises, in how far the *cessio* affects co-securities. Let it be supposed that one of the co-securities is sued *in solidum*, and the others are absent, so that the *beneficium divisionis* cannot be resorted to by him, such joint surety has, by the Roman law, no regress against his brother bondsmen without the cession.

The *beneficium cedendarum actionum* as regards one surety;

as regards co-securities.

§ 1615.

The cession, according to strict law, must be made by the creditor before the payment, since his right is extinguished with the satisfaction of the debt. The Roman lawyers, however, import some equity into this case, deciding, that if the surety pay under the condition that the creditor cede him his right, such cession is valid after payment made.² The case, however, becomes

When the cession must be made.

¹ I. 3, 21, § 4.

² Roman, like English equity, which is indeed almost entirely derived from it,

looks upon "conditions to be performed as actually performed," for a fiction is necessary for the sake of logic.

very doubtful when no express condition pre-existed, and the opinions of the best lawyers are at variance¹ on the passages of Modestinus² which refer to this case. To quote all their arguments pro and contra would be out of place here; Höpfner³ thinks it is to be looked upon as a *pactum tacitum de cedendis actionibus*, inasmuch as the surety pays with the expectation that the cession will be made, but Höpfner has clearly been misled in giving so great an extent to equity.

§ 1616.

Constitutum
may be posses-
sory, promissory,
proper, or
foreign.

The *constitutum* may be possessory or promissory, which is a promise to do a certain thing, founded on an obligation already contracted; it is termed *proprium* when founded on the party's own, and *alienum* when on another's obligation. Its peculiarity of a *constitutum* was, that the former obligation might be varied by it, that is, increased, another place fixed for its fulfilment, or even the person of the debtor changed.⁴ It is not a *geminatum pactum*, because an obligation arising out of a *delictum* may be the foundation of it. The promise must refer to a former promise, not be a repromising of the thing in question. A *constitutum*, though conceived *nudis verbis*, grounds an action, because⁵ *constitutum semper debitum aliquod præsupponit, illique accedit, ad eoque in eo de seriâ et maximâ promittentis voluntate certius patet (quam in aliis nudis pactis)*. Ulpian says,⁶—*Hoc edicto prætor favet naturali æquitati qui constituta ex consensu facta custodit quoniam grave est, fidem fallere*.

When promissory.

When foreign.

The *constitutum alienum* differs from the *fideijussio* in form, being conceived in ordinary words. *Fideijussio* is utterly invalidated—1. By the surety binding himself to harder conditions; 2. For a higher sum; 3. Of other things. A *constitutum* is not so in the first two cases; the *constitutum*, though not good for more, is yet good under the same conditions, or for the same sum, as in the original obligation; but in the last case, he is bound to give such other thing; for instance, A to give a horse if B do not pay the debt.

Constitutum
alienum.

The *constitutum alienum*, moreover, differs in some measure as to the object being more calculated to accommodate the creditor with respect to time and place of payment.⁷ The action arising out of this *actio constitutoria* or *de constitutâ pecuniâ* was most advantageous in the Roman law, being a method of obtaining a ground for action which, otherwise, did not exist.

¹ Molinæus in lect. Dolan, p. 5-37.

² P. 46, 3, 76; P. 46, 4, 36.

³ § 745, ad fin; Carpazov, P. 2, C. 17, D. 16; Struv. ex 47, th. 45; Puf. t. 1, obs. 130; Wernher, l. c. n. 124; Brunne-mann, c. 3, dec. 48; Zanger, de except. pt. 2, c. 16, n. 32.

⁴ P. 13, 5; 1, § 2, 5; 3, § 2; 5; 13;

14, § 1, 2; 19; C. 4, 18, 2, pr.

⁵ Franzk ad Pand. tit. de const. nec.

n. 7.

⁶ P. 13, 5, 1, pr.

⁷ I. 3, 21, pr.; P. 41, 2, 1, § 8; P. 2, 8, 1; P. 13, 5; 3, § 2; 4; 5, pr.; 16, § 1.

§ 1617.

We have seen that all who can stipulate can give security for others. Women, however, are excepted from this rule,¹ for they cannot even be received in *fidejussionibus judicialibus*, it being considered infamous to bring a woman into the forum, or that she should there conduct her own cause; suretyship is regarded as a masculine and civil affair with which women have no concern.² So severe, indeed, is this prohibition, that women were anciently not allowed, under any circumstances, to renounce this privilege; hence women were safe in all cases, except where they had become security for the tutors of their children; or had become so with intent to defraud;³ this invalidity extended to all the so-called *intercessionibus*, or obligations by women in favor of a third party upon any contract whatever.⁴

Women cannot
be sureties.

§ 1618.

The *Senatus Consultum Velleianum*, before alluded to, was drawn up under the Consuls M. Silanus and Velleius Tutor,⁵ A.U.C. 771 (A.D. 18). The names of these consuls, however, are not found in the *Fasti Consulares*; the name of the first appears in the reign of Claudius, A.D. 46.⁶ According to Ulpian, Silanus was consul by the *Fasti*, in A.D. 19.⁷ Ulpian⁸ tells us that it was first interdicted in the time of Augustus; and again, in that of Claudius, *ne fœminæ pro viris suis intercederent*, and that a *Sctm.* was subsequently passed as follows:—*Quod M. Silanus et Velleius Tutor, Consules, verba fecerunt ne obligationibus fœminarum, quæ pro aliis reæ fierent, quid de eâ re fieri oportet de eâ re ita consuluerunt. Quod ad fidejussiones et mutui dationes pro aliis, quibus intercesserint fœminæ, pertinet, tametsi ante videtur ita jus dictum esse, ne eo nomine ab his petitio neve in eas actio detur, cum eas virilibus officiis fungi, et ejus generis obligationibus obstringi non sit æquum, arbitrari Senatam recti atque ordine facturos, ad quos de eâ re in jure aditum erit, si dederint operam, ut in eâ re Senatus voluntas servetur.*

Provisions of
the *Senatus
Consultum
Velleianum.*

Heineccius⁹ supposes Augustus and Claudius to have introduced this measure to restore the ancient law, which had become obsolete. Perhaps, however, some of the laws of Augustus, in favor of married women with families of three children, may have rendered the force of the old law doubtful or inoperative; hence the old law was expressly revived to give it precedence over later enactments.¹⁰

Justinian has the following passage in the *Codex*:¹¹—*Ne autem*

¹ Paul. R. S. 2, 2, 1.

² P. 16, 1; 1, § 1; 2, § 1.

³ Paul. R. S. 2, 2, 1; P. 16, 1, 2, § 3.

⁴ Ger. Noodt. obs. 1, 18.

⁵ P. 16, 1.

⁶ Dio. Cass. 60, 27.

⁷ Tac. An. 2, 56.

⁸ Ad Edict. 19; P. 16, 1, 2.

⁹ Ant. Rom. 3, 21, 14.

¹⁰ PK.

¹¹ C. 4, 29, 23.

mulieres perperam seu pro aliis interponant, sancimus, non aliter eas in tali contractu posse pro aliis se obligare, nisi instrumento publicè confecto, et a tribus testibus subsignato, accipiant homines a muliere pro aliis confessionem. Tunc tantumodo eas obligari, et sic omnia tractari quæ de intercessionibus fœminarum vel veteribus legibus cauta vel ab imperiali auctoritate introducta sunt. Seu autem extra eandem observationem mulieres acceperint intercedentes, pro nihilo habeatur hujusmodi scriptura vel sine scriptis obligatio tanquam nec confecta, nec penitus scripta; ut nec Scti. auxilium imploretur, sed sit libera et absoluta, quasi penitus nullo in eâdem causâ subsecuto.

Exceptions from
the Sctm.
Velleianum.

The exceptions to the Velleian Sctm. are as follow :—Generally when privileged against this Sctm.—in case of a minor—the ransom of a slave—or dower. Other exceptions admitted by law are,—the intention of the woman to defraud by offering her invalid security to induce the creditor to lend—when she borrows, and gives the thing to a third party—when her property is pawned without the creditor's knowledge—when she has received a consideration for the act, or has repeated it within two years, &c.—in a word, cases of fraud, when she is punished, and the fraud rendered futile by the intercession being declared legal. On comparing the authorities¹ and commentators on the subject, it would appear that a woman could not renounce her exemption.

The eighth chapter of the 134th Novel strengthens the Sctm. Vell. as regards the *intercessio* of a woman for her husband; that for other men must be referred to the extract from the Codex above.

Soldiers and
clerks incom-
petent as
sureties.

A soldier is no good security;² persons in holy orders, *ut non per hanc occasionem et sanctis domibus damnum fiat, et sacra ministeria impediantur.*

¹ I. H. Böhmer, *dis. cit.*; Vinn. *quæst.* 1, 48; Averan, *interp. jur.* 5; Hellfeld, *com. de inter. mul. et Scto. Vell.* § 37, sq.; in *op. p.* 305, sq.; *cum multis aliis.*

² C. 4, 65, 8, & 31; Io. Lud. Schmidt, *de fidejuss. plane non obgl.* § 71, sq.; Ayer, *progr. de fidj. milit.* § 10, sq. in *opuscul.* tom. 1, n. 7.

TITLE XXI.

Literarum Obligationes—Ante Justinianum—Post Justinianum—Scriptura Documentum—Cautio—Syngrapha—Chirographa—Apocha—Querela Condictio et Exceptio non Numeratæ Pecuniæ—Dotis Datio—Parallels with modern Bills of Exchange and Bonds.

§ 1619.

As *real* contracts require fulfilment by one ; *consensual*, of which hereafter, by both of the contracting parties ; and as *verbal* contracts derive their validity from a certain form of words ; so in like manner, *literal* contracts, as the name imports, must, to effect the same end, be reduced to writing. The early history and the origin of this form of contract is said by commentators to be exceedingly uncertain, and to rest, in a great measure, on deductive evidence and surmise.

The origin of literal contracts obscure.

It has been supposed, that, inasmuch as a contract affected by stipulation was not capable of variation, any change in the terms was brought about by first discharging the original obligation and substituting for it a new contract in writing, varied as desired, such written evidence superseding the prior verbal agreement.

§ 1620.

The literary obligation had, it would appear, three distinct operations.

Operations of the literal contract.

First, it was used as a means of modifying a former contract.

Secondly, to convert a common contract debt into a specialty or bond debt.

Thirdly, for the purpose of transferring a credit to another person.

But it may be asked if the obligation be discharged, and the substituted agreement be not contracted in the same manner as it was in the first instance, namely, by stipulation, how reducing a verbal agreement to writing could be binding *vigore scripturæ*, if not so *vigore verborum* ? Where, therefore, a literal obligation superseded a prior verbal one, it did so not by reason of the reduction to writing, but because a new stipulation, or at least agreement, was entered into in evidence, of which a note in writing was made ; and this view is amply supported by Theophilus, who says, *λίτερις ἐστὶ τὸ παλαιὸν χρέος εἰς καιρὸν*

Literary contracts not binding because reduced to writing.

δάνειον μεταληματηζόμενον ῥήμασι καὶ γράμμασι τοπικοῖς,—that is to say, an obligation in writing consists in the old debt being converted into a new loan by formal words in writing.

The writing alone was not sufficient to effect the novation ; it was merely incidental to it, and probably introduced at a time when writing became more customary, with the view of affording permanent evidence of the points of variation whereby it could be readily demonstrated, wherein the second contract deviated from the first.

Various cases to which literary contracts were applicable.

This, then, may be termed the most simple form of literary obligations. There are, however, two other purposes for which this species of contract appears to have been used ; and although both possessed the same element of change, they were, nevertheless, widely different from each other.

§ 1621.

The literary obligation used to convert a simple contract debt into a specialty.

It may readily be supposed that a creditor might wish to have some more lasting testimony of the debt due to him than that supplied by mere oral evidence, especially when the debt had been due for a period running near the term of prescription ; he might wish to keep alive the security without pressing the debtor to pay him, and the *literarum obligatio* supplied a ready means for effecting such an object. To judge from the *formulae* which have survived, it would appear that the consideration for the debt must appear on the face of the document, and that once admitted in this formal way, the debtor was estopped from pleading a want of consideration ; and if this were so, it was, quoad its effect, on all fours with a deed by the law of England.

In illustration of the foregoing remarks, we read—*Nam si quum quis mihi centum aureos deberet exemptione aut locatione, aut mutuo, aut stipulatione (multis enim modis nobis aliquid deberi potest) : voluissem hunc mihi obligatum esse literarum obligatione : necesse erat verba hæc dicere et scribere ad eum quem literarum obligatione obligatum habere volebant. Sunt autem hæc verba quæ aut dicebantur aut scribebantur ;*¹ hence we learn that bargain and sale, contracts of letting and hiring, of loan or stipulation, could be novated in this manner ; that *centum aureos quos mihi ex causâ locationis debes, expensos tibi tuli ?* were words constituting a sufficient question, and *expensos mihi tulisti* a sufficient answer. D. Gothofried gives the Greek paraphrase of this passage:—*τοὺς ἑκατὸν χρυσίους, οὓς ἐμοὶ ἐκ αἰτίας μισθώσεως χρεώστης, σὺ ἐκ συνθήκης καὶ ὁμολογίας δώσεις τῶν δικαίων γραμμάτων.*

To this the reply was—*ἐκ τῆς συνθήκης ὀφείλω τῶν δικαίων γραμμάτων.*

¹ Theophil. ed. Fabrot. Jac. Oisel ad Caii Inst. 2, 9, 12, p. m. 161 ; Schulting, Jurisp. vet. Antejust. p. 163 ; Barn Brissou.

de Form. lib. 6, p. 537, et Salm. de Usur. 6 ; Heinec. A. R. 3, 22, § 6.

The literal obligation was, therefore, nothing more than an acknowledgment in writing of a debt admitted to exist, and arising out of some legitimate contract. The stipulation consisted in a promise to give or pay, and is therefore evidence of a *future* contract or obligation to be performed; but the literal contract is evidence of *an* obligation completed by one side.

The same author then concludes, *Et tum prior obligatio extinguebatur, novaque ex literis nascebatur obligatio, quæ ex eo nomen habet quod literis consistit*;¹ but this would, therefore, scarcely appear to be correctly stated,—for no new obligation is by these means entered into; the one promises to lend another a sum of money for his rent by stipulation, and does so, whereupon his obligation is extinguished by performance, but he also requires security for repayment; and one mode of effecting this was by a receipt or acknowledgment in writing, which was either coupled with a new stipulation, or which the law held to be so far a consequence and not to be too remote, but to be sufficiently nearly connected with the original stipulation to render it valid as an accessorial contract.

§ 1622.

A third use of the literal obligation was to transfer a debt from one to another, *delegare*; and this might arise in two ways—either it might be desirable to transfer the debt due upon a transaction of bargain and sale to another, which was then said to be *a re in personam*, or to make over to a third party the debt on obligation, termed *a persona in personam*. The discovery of Caius' works has thrown considerable light upon this subject; he writes—*Literis fieri obligationem aut a re in personam, aut a persona in personam. A re in personam, veluti si id, quod ex emptione aut conductione, aut societate debes, alii reddas. A persona in personam, veluti si id quod mihi alter debet, alteri persona delegem, ut reddere debeat*.²

Literal contracts used for the purpose of transferring debts.

§ 1623.

From Cicero's³ testimony it appears that, to be sued for, the money must first be *pecunia certa*, which debt may arise either out of a stipulation—and if so, the place, day, time, must be stated, also in whose presence the stipulation was entered into and the witnesses called; if *pecunia data*, or, as an English pleader⁴ would express it, "lent by the plaintiff to the defendant at his request," or "money had and received," it must be confessed, probably sworn to by the plaintiff; or it might be *lata expensa*, "money laid out and expended for the use of the defendant," or "money found to be due from the defendant to the plaintiff on an account then stated between them;" in which case it must be

Requisites of a literary contract.

¹ Theoph. ed. Fab. l. c.

² Caii Inst. 2, 9, 12.

³ Cic. pro Rosc. Comed. 5.

⁴ Stephens on Pleading, p. 42, 5th ed.

Given in evidence by reading in court.

proved by some entry in the books of partnership or ledger of trust account, guardianship, &c., in *codice* of the plaintiff, shewing the debtor and creditor account between the parties (which the English law of evidence does not admit), and such book produced in court, otherwise the proof was not admissible, as it is indeed with us, who require written evidence to be "put in" if it exist, and such memorandum to be signed by the party to be bound thereby, and no secondary evidence given of the fact, without proof of the loss or destruction of such written evidence being first given: thus Cicero says,—*Expensum tulisse non dicit, cum tabulas non recitat*; he does not support his plea of money laid out and expended, who does not give oyer of the bond.

Theophilus further tells us, that such a literal obligation may be contracted by a letter from the debtor to the creditor, or *vice versa*; and his reply, whence we may infer that an entry in the creditor's book, with the debtor's consent, would originate an obligation.

Admuneratio, expensi latio.

The expressions *adnumeratio*, *expensi latio*, and *stipulatio*¹ are met with in classical authors,—the first implies a formal counting out of the money to the debtor; the second, an expenditure incurred by the creditor for and on behalf of the debtor; the last has been already discussed. It appears, therefore, that to maintain an action, the production of the writing, *chirographi exhibitio*, was requisite; that the tablets should bear a signature or a seal, *tabularum obsignatio*, which may be doubtful; but the *propositio ob* would seem rather to imply sealing, the more so as the word *chirographum* of itself imports own proper handwriting, and the presence of witnesses, *testium intercessio*,² to prove these facts. So far there is some authority for our guidance, but there is none respecting the number of witnesses to this bond, whether the same required in other transactions in which witnesses were necessary, such as quiritian transfers, testaments, and the like, whether seven male Roman citizens of full age who opposed their seals together with their names to the bond, as in wills or a less number, it is impossible now to determine. It may be objected that it would be next to impossible to call together seven legal witnesses for every transaction of this nature; but that difficulty, in a great measure disappears, when we consider the lounging, gossiping life led by the civilized nations of that age; by the Romans in the forum, and the Athenians in the Agora, employing their whole day in inquiring the news.³ This form was probably invented to avoid the necessity of proving a consideration or *causa*, since so solemn an act implied of itself a consideration; and that a want of it could as little be pleaded as to these Roman bonds after the

¹ Cic. pro Q. Rosc. Com. 4; Ascon Prædian in Cic. Verr. 3, p. 1848.

² Gell. N. A. 14, 2.

³ *τι καὶ οὐδὲν*. But it is also possible,

though not probable, that the witnesses were not called till the bond was put in suit for the purpose of proving the handwriting of the parties.

expiration of two years as to English bonds at any time. These must, therefore, be looked upon rather as unconditional bonds, to pay absolutely a certain fixed sum therein mentioned, than in any other light.

It may probably be going too far to compare a certain class at least of these literary obligations to promissory notes for simple money lent, namely, those given to the *argentarii*, in connection with whom they are most frequently mentioned; indeed, nothing could be more simple or expeditious than the process or handing over the money by the banker¹ to the debtor, together with the account of the transaction, which the latter also signed with the formalities required by law to constitute a valid obligation.

§ 1624.

Lastly, Justinian mentions the *nomina*, which formed an ingredient of this contract; and states that this part of it was discontinued *olim scripturâ fiebat obligatio, quæ nominibus fieri dicebatur, quæ nomina hodie non sunt in usu.*² What then were these *nomina*? Some suppose them to have been nothing more than the formal signature of the contracting parties to the debtor and creditor account, *in tabulis excepti et expensi*, in token of its correctness, or in testimony of such being the account referred to; but this is hardly satisfactory, although it doubtless often formed an element in the transaction: and it was perhaps in this manner that *nomen* technically came to denote a debt.³ Hence it appears that such bonds were applicable to money had and received, or laid out and expended; to purchases, hirings, or partnership⁴ (*emptiones, locationes, societates*); to the cession of debts, an obligation in writing which Caius⁵ illustrates by the expression *nomina transcriptitia*. In any of the three above cases, the entry in his book (*codices* or *tabulæ expensi et accepti*) as debt is evidence; this was called a *nomen transcriptitium a re in personam*, a debt transferred, but *transcriptio à personâ in personam*, when the debt of the debtor's debtor had been made over to the creditor by the principal debtor, and entered as between the creditor and the third party as principals; it was termed *delegatio*, the transfer or making over a debt.

Nomen used to signify a debt.

Cases to which this obligation applied.

The original *literarum obligatio*, however, appears gradually to

¹ Rich patricians and capitalists carried on this profitable trade indirectly by their slaves, and it must have been by such means that the lower classes became so deeply indebted to the higher.

² l. 3, 21, pr.

³ Articles of account, *quia in tabulis rationum perscribitur nomen ejus qui pecunia accepit*, Ascon. in Verr. 3, 10. *Tituli debitorum nomina dicuntur*, Cic. pro Rosc. Com. 1. To pay a debt, *nomen solvere*, Id. in 6 et 16, ad Att. 2. Call in his debts, *Nomina sua exigere*, Liv. 35, F. Strike a debt out of the books, *expungere nomen*,

Cic. 7, Verr. 7; transfer a debt, *nomen transcribere in alium*, Pl. Cistell. 1, 3, 40; in obligations and land, *fundis nominibusque depositum*; pecunia sibi esse in *nominibus*, in *fundis*, Petron. Sat. 117; create debts, *nomina facere*, p. 15, 1, 4. The debtor, too, is *nomen*, Cic. fam. 5, 6. A solvent debtor, *bonum nomen*, Senec. 5 de benef. 22. Sure debtors, *optima nomina*, Senec. 7, de bon. 29. Slow paymasters, *lenta nomina*, Colum. 1, 7. Quære was the *literarum obligatio* a stipulation reduced to writing.

⁴ Cic. de Off. 3, 14.

⁵ 3, 128.

have undergone various changes and modifications, and to have been rendered much more simple than it originally was; and the law upon this subject was consolidated and declared by Justinian.

§ 1625.

Cautio, documentum, scriptura.
Apocha.
Syngrapha.

An obligation in writing might be either a *cautio*, a *documentum*, or a *scriptura*, wherein an obligation is stated to exist; but when it is stated to be satisfied, it is termed an *apocha*, or a discharge.

Chirographa.

The obligatory documents, however, may be either a *syngrapha* to which both are parties, and of which bilateral species are contracts of marriage, agreements for sale, or leases; or *chirographa*, in which one party only acknowledges unilaterally his obligation, as a promissory note to pay a sum arising out of some transaction or loan.

The obligation becomes absolute by lapse of time.

These documents serve merely as proofs of themselves, consequently an obligation is taken to exist because clothed in this form; no respect being had to the age of them, but in cases of loan and assignment of dower, *datio dotis*, the document does not constitute a *proof* before the lapse of a certain time, after which it becomes operative.

The obligations arising, after the lapse of a certain time, out of such handwritings, are termed *literarum obligationes*.

§ 1626.

The special plea or exceptio n. n. p. not available in bar after two years;

On admission of a loan in writing, the defendant may be sued either *before* or *after* the expiration of two years; to which, if in the first case, *exceptio non numeratæ pecuniæ* be pleaded, the plaintiff is driven to another mode of proof, viz., by witnesses, and by the *juramentum dilatum*, or putting the defendant to swear that he had never received the money; but if the plaintiff do not proceed, the defendant may bring his *querela non numeratæ pecuniæ*, and recover his promissory note by *condictio sine causâ*; the object of this being to protect the debtor, who had given a note for which he had not received any value. In the latter case—that is, after the expiry of two years—this plea is no longer available, for it is held to be improbable that the debtor should allow two years to elapse without getting a consideration for his note; but if the creditor be absent, and the maker of the note fear the two years will expire, he may go before a judge, and on protest against consequences, his *exceptio n. n. p.* is rendered perpetual,—that is, available at any time, however distant, after the expiration of two years.¹

nor after receipt confession by will, and juramentum dilatum.

The plea of *non numeratæ pecuniæ* may, as above, be not pleadable or lose its effect in certain cases, as when, in addition to the promissory note, the maker thereof at a *subsequent* period delivers a receipt to the creditor for the money as additional security, or by express or tacit admission of the receipt of the money before witnesses, or by any act, such as a payment of interest on the loan, or as an instalment of the gross sum lent. Confession of the debt, in the will of a testator, also deprives the heir of his plea of *n. n. p.*

¹ C. 6, 30, 7, 8, & 9, § 4.

Lastly, if all fail, as above remarked, the creditor can call upon the debtor to swear that he never did receive the money in question.

The plea of *non numeratæ pecuniæ* was not available against bankers or money-lenders, termed *argentarii*,¹ who transacted their business in the forum, because no one would trust them with a promissory note without receiving the value at the time; in addition to which, it was their custom to pay the money at once over the counter.

nor as against bankers.

The plea *n. n. p.* is available in abatement within two years, when an obligation has been given for a sum greater than that actually received;² the special plea being *minorem pecuniam te accepisse et maiorem cautionem interposuisse si apud eum, qui super ea re cogniturus est, constiterit, nihil ultra quam accepisti, cum usuris in stipulatum deductis, restituere te jubebit*.

Available in abatement as to part;

Where an obligee, having made his note of hand, but not having received value for it, demands it back, and is assured that it is lost or destroyed, he may obtain a certificate or note under hand wherein the fact is stated, and which protects him from an action on it, should it ultimately turn up.³

and in the case of the release of a lost note of hand.

§ 1627.

The next question is that of dower; receipt of the dower may be acknowledged, termed *dos cauta*, in the contract of marriage, without having in fact been received. A dissolution of the marriage may take place *before* the expiry of two years, or *after* that period; or *within* ten years, or *after* ten years.

The *dotis datio* as affected by the obligation in writing on dissolution of marriage.

In the first case, if the father-in-law sue *within* the year, he may be driven by the defendant to proof of actual payment, *alioquin*, by the *exceptio n. n. p.*; not so, if he sue *after* the expiry of the year,—in which case, the son-in-law must repay without appeal; and Justinian⁴ gives the reason of this constitution thus: *si tacere elegit maritus, palum est, voluisse, etsi non accepit dotem, omnino eum aut suos reddere heredes*.

Pleas in answer to actions thereon within a year;

In the second case, where the dissolution took place *after* two, but *within* ten years, if the father-in-law sue *within* three months, he may be met by the *ex. n. n. dotis*; but if he sue later, the son-in-law must pay without remedy.

within 10 years;

In the third case, *after* ten years, if the father-in-law sue, the son-in-law has no course left open but payment.

after 10 years.

In all these cases the same exceptions apply.

§ 1628.

The *condictio ex chirographo* may be brought by the holder of an acknowledgment of a loan, or of a *dotis datio* received, which acknowledgment had attained the legal age of two years, or in case of dower: it is, firstly, a year *after* the termination of the

Condictio ex chirographo.

¹ Nov. 136, 5.

² P. 2, 14, 47, § 1.

³ C. 4, 30, 9, *placita creditor non dederit*;
Harm. 2, 2, 1, & 2; C. 4, 30, 2.

⁴ Nov. 100, 1.

coverture ; or, secondly, within three months after the termination of the coverture ; or, lastly, the decennial duration of the coverture.

§ 1629.

The plea *n. n. p.* only available in cases of debt and *dotis datio*.

Inasmuch as the promissory note occurs only in the case of debts and *datio dotis*, the plea *n. n. p.* is consequently not available in other transactions,—such, for instance, as that of a deposit,¹ for no person would acknowledge having received one without its being in his possession ; hence the law is positive on this point, so far at least as throwing the *onus probandi* of payment on the plaintiff : thus, in other transactions, this *exceptio* may be indeed pleaded, but the defendant must himself prove its truth, not the plaintiff ; neither can he be put on his oath, if other modes of proof fail. *Illud semper observandum est, in quibus casibus non promittitur exceptionem n. n. p. proponere, vel ab initio, vel post taxatum tempus elapsum in his nec iusjurandum offerre liceat.*² This extends to any period within ten years, after which lapse of time, as we have seen, the debt will be prescribed, or, as an English lawyer would term it, statute run.

§ 1630.

Evidence of payment by receipt.

A receipt at once furnishes proof of payment in the case of *argentarii*, who, as they were never trusted, gave in like manner no trust in other cases, when it is desired to impugn the validity of a receipt, if the action be brought within thirty days after date of such receipt, the maker thereof may reply, that he never received the money ; this is termed *replicam non numeratæ pecuniæ*, which requires some proof of payment over and above the receipt. But if the action be brought after thirty days have elapsed, the receipt is in itself sufficient proof of payment, and excludes all evidence to the contrary.

§ 1631.

Erroneous opinions respecting the *n. n. p.*

Some jurists, among others Zoll,³ have endeavoured to impugn this doctrine, asserting that an action on a note may be brought after the legal time, but must always be proved, which they found on a confusion between the *exceptio n. n. p.*,⁴ and the *ex. deficientis causæ debendi* ; but this latter is a perpetual plea, the former limited to two years. Nor do the above laws speak of the want of cause of debt, *deficiens causa debendi*.

Others think⁵ the plea *n. n. p.* applies to other obligations besides loans and dower, for which there is however no ground in the law, which is explicit.⁶

¹ C. 4, 30, 14, § 1.

² C. 4, 30, 14, § 3.

³ Diss. de ex. n. n. p. Th. 5 ; Boehmer, intr. in jus dig. tit. de reb. cred. § 22.

⁴ C. 4, 30, 3, & 10.

⁵ Lauterbach, coll. th. pr. tit. de reb. cred. § 63 ; Cocceii, jur. cont. eod. tit. qu. 23.

⁶ Gothofr. ad C. 4, 30, 6 ; Huber, ad Inst. 3, 22, n. 1.

The *exceptio n. n. p.* is said to be *privelegiata*, when, in case of a note which has not attained the legal age, the plaintiff must prove the payment; but if the note has attained the legal age, the defendant, who pleads *ex. n. n. p.*, must prove his plea: this is termed *minus privelegiata*.

The following passages are the principal ones which refer to this subject:—*Si quis debere se scripserit quod sibi numeratum non est, post multum temporis exceptionem opponere non potest. Hoc enim sæpissimè constitutum est.* Sic fit ut et hodie, dum quære non potest scriptura obligetur.¹ *Qui negat numerationem esse factam nisi intra biennium aut convenietur, aut ea de re protestetur nullam habet defensionem.*²

§ 1632.

Neither in Rome nor in modern Europe can it be said that an obligation arises out of any writing, for, on reflection, it will be found that the writing amounts to nothing more than such evidence of a contract, as the law has declared to be of itself conclusive evidence of the facts described in it. Thus, a promissory or accepted bill of exchange is evidence of a promise to pay a certain sum at a certain time absolutely, and is the only instance of the transfer of a chose in action in the English law; and being, as Mr. Baron Parke remarks, with his usual logical acuteness, unknown to the common law, all questions not statutely provided for, which arise upon bills of exchange, must be resolved by reference to the law of the country whence they drew their origin.³

English bills do not require any consideration to be stated upon the face of them, a sufficient consideration being presumed; but, on the other hand, they may, when due, be met by a plea of want of consideration.

Foreign bills, on the contrary, are exempted from this inconvenience, because they must bear on the face of them evidence of value; and in some countries, as in France and Belgium, for what, as *valeur reçu en espèces, en effets, &c.*

A date is not required to English bills, it being permitted to supply it by evidence; but foreign bills⁴ are invalid if the date be omitted. Generally, then, a foreign bill of exchange is a far more stringent and exact instrument than an English one, upon the principle that bills should not be given rashly or without due reflection, but that it is of vital importance to the commercial community that they should be open as little as possible to subsequent impeachment.

Bills of exchange are generally asserted to be an invention of

Comparison of the law of obligation in writing at Rome and in modern Europe.

Bills of exchange.

English bills do not require the consideration to be stated.

Otherwise with foreign bills.

Date immaterial in English, and indispensable in foreign bills.

Were bills of exchange known in the classic period?

¹ I. 3, 22.

² Harmenop. 2, 2, 4. Donell, com. 14, 38; Hunn. resolut. l. 3, pt. 6, q. 2, p. 794; Fachin contrav. l. 2, c. 81; Vinn. Com. h. t. n. f. sq. et in quæst. sel. l. 1, c. 41; Nebelkrae decis. 22; Cocceii, jur. contrav. q. 29; Wernher, pt. 1, obs. 6.

³ Forster, exr. of J. Clark, v. Dawber, 20 L. J. 385.

⁴ Die neue allgemeine deutsche Wechselverordnung, 1851, § 4, p. 270; Code de Com. tit. viii. sec. 1, § 110.

the Lombard Jews of the middle age, and unknown to classic nations; and Pothier, quoted by Mr. Serjeant Byles, in the preface to his Treatise on Bills, alludes to the letter of credit by Cicero to his son Atticus, transferring to him a debt due in Athens, as the nearest approach to a system of bills. By bills must be understood the transfer to a third person of a credit due, further transferable by such third person, or his transferee, *ad infinitum*; and there is certainly some evidence of this having been practised at Rome.

For in the fragment of Caius, before alluded to, we find *a persona in personam, veluti si id quod mihi alter debet alteri personæ delegem ut reddere debeat*. What is this but an indorsement or assignment over to another? which is the essence of a bill of exchange. On the other hand, no one will contend that bills existed with exactly the same formalities as at present, of notings and protestings; for if they did exist, they were transferable bonds. Nor is there any more reason that these should not have been exchanged in the Forum at Rome than at the Bourse¹ of Antwerp, Hamburg, or Amsterdam, or in the Exchange of London. It is notorious that the Jewish population was considerable at Rome, even at a very early period; and it is difficult to imagine the possibility of the existence of that race without its bills of exchange.

The *Senatus Consultum Macedonianum* was avowedly passed to prevent minors anticipating their paternal inheritance, by what at the present day would be called "doing bills."

§ 1633.

A bond, like a bill, is mere evidence of a contract, originally an obligation between the parties to it; and the solemn execution, by signing, sealing, and delivering, as act and deed, probably follows a similar transaction in Rome much more nearly than we are at all aware. The origin of sealing has been already developed,² and had its practical worth in ancient Rome, while it has become in England a senseless formality, which might conveniently be dispensed with. Abroad, the use of seals is much more frequent than in England, and preserved for the purpose of improving the evidence of execution, an effect which it certainly has in the case of the official seals of all public authorities. The instrument, however, if valid *per se*, is not, as in England, of a different nature because under seal. But in England, sealing as such has been reduced to an absurdity by the practice of using a common wafer, incapable of special identification.

¹ The first of these is the most ancient, the other three by far the most important in the world. The origin of this word is curious. The merchants of Antwerp formerly used to meet at a tavern of the sign of the "Purse," for the purpose of transacting their exchange business; as the place

rose in commercial importance, it was found requisite to enclose a space near for the purpose, which however retained the name. The Bourse of Antwerp is, therefore, the godfather of all exchanges, which latter term is confined to London.

² § 1221, h. op. p. 214.

Instruments
under seal in
Rome and in
England.

Seals were used in Europe instead of signatures at a period when few were able to write, though it is denied that this is the origin of seals, which must be referred to the Roman practice of sealing up the tablets to avoid falsification of the contents, the witnesses writing their names opposite to their seals, in order that they might be summoned when the tablets were opened, to verify the fact of the document not having been tampered with in the interval; they, too, were allowed to use seals not their own, but then these were seals capable of identification, and not mere wafers stuck on a patent document. Eastern nations do not subscribe instruments, or even common letters, but, whether literate or illiterate, appose a seal, smeared with ink,¹ and bearing the name, it being asserted that any one may forge a signature,² but that it is very difficult to forge a seal; the office of seal-bearer to great functionaries is, consequently, an office of the highest confidence.³

Various origins
of seals and
deeds.

¹ The important letters of great men in the East are usually enclosed in a piece of muslin, knotted at the four corners, and connected with a seal of soft red wax.

² The author has, nevertheless, seen forgeries. This is done by breathing on the impression, and taking off the seal with the

thumb, over which a kid glove is tightly stretched, which is then pressed upon the part of the forged document, damped to receive it. The ink being a composition of sugar, gum, and lamp black.

³ Moheurdah.

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LONDON:
PRINTED BY STEWART AND MURRAY,
OLD BAILEY.

